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No. 93-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

IRENE MOJICA,

Petitioner,

v.

GANNETT COMPANY, INC.,
owner of WGCI-FM Radio Station,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Civil Rights Act of 1991 shall apply to those cases pending in the district courts prior to enactment, but having not yet been tried before a judge or jury on the merits.

2. Whether the decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) shall apply to those cases tried in the District Courts after enactment of the Civil Rights Act of 1991 which expressly superceded *Patterson*, involving incidents occurring prior to the *Patterson* decision.

3. Whether the decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) requires reversal of a jury verdict finding promotional opportunities were discriminatorily denied to petitioner.

4. Whether if *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) requires reversal of the jury verdict, it also requires a retrial where the District Court judge has already indicated he would find that respondent had discriminatorily denied promotional opportunities to petitioner.

LIST OF PARTIES

The parties to the proceedings below were petitioner, Irene Mojica (Plaintiff-Appellee) and respondent, Gannett Company, Inc. (Defendant-appellant). The petitioner is not a corporation.

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No. 93-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

IRENE MOJICA,

Petitioner,

v.

GANNETT COMPANY, INC.,
owner of WGCI-FM Radio Station,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Irene Mojica ("Mojica") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the *en banc* United States Court of Appeals for the Seventh Circuit is reported at 188 Daily Lab. Rpt. F-1 (Sept. 30, 1993) and is attached hereto at 1a.[1] The panel's opinion is reported at 986 F. 2d 1158 (7th Cir. 1992) and is also reproduced in the appendix at page 34a. The Judgment of the United States District Court for the Northern District of Illinois, visiting Judge Glen M. Williams presiding, is reproduced in the appendix at page 54a. The Order and Memorandum Opinion of the United States District Court for the Northern District of Illinois, Judge William T. Hart presiding are reprinted in the appendix at pages 62a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 1993. This Court has jurisdiction to review the judgment of that court under 28 U.S.C. section 1254 (1).

STATUTES INVOLVED

The Civil Rights Act of 1964 and the Civil Rights Act of 1991 are involved in this case.

Section 22 of the Civil Rights Act of 1991 provides in pertinent part:

> (a) IN GENERAL. -- Except as otherwise specifically provided. this Act and the amendments made by this Act shall take effect upon enactment.

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[1] "__a" references are to the accompanying Appendix hereto.

(b) CERTAIN DISPARATE IMPACT CASES. -- Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975 and for which an initial decision was rendered after October 30, 1993.

STATEMENT OF THE CASE

This case presents the identical question of retroactivity heard by this Court in oral argument on October 13, 1993 in *Landgraf v. USI Film Products*, No. 92-727, *cert. granted* 113 S. Ct. 1250 (1993). This case presents questions of national significance to employees nationwide: whether prior to trial on their Title VII claims, those victims of discrimination may amend their complaints to include the remedies provided by the Civil Rights Act of 1991.

This case also presents questions on the applicability of this Court's ruling in *Patterson v. McLean County Credit Union*, 491 U.S. 164 (1989). This issue is also significant to employees nationwide *if* this Court does not allow retroactive application of the Civil Rights Act of 1991 since significant issues unanswered between the time *Patterson* was announced and the time the 1991 Civil Rights Act was enacted would remain open and undecided by this Court. Significant among these to this case and to employees nationwide are whether *Patterson* itself is to be applied retroactively. Also significant to employees nationwide and to the instant case is the scope of *Patterson's* applicability to discriminatory promotion practices.[2] Moreover, it is significant to this case whether the findings of the District Court Judge that Petitioner was illegally discriminated against

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[2] See *Malhotra v. Cotter & Co.*, 885 F. 2d 1305 (7th cir. 1989)

in promotional practices must be vacated and a new trial conducted on the same issue simply because a jury was empaneled.

In a divided opinion, the Seventh Circuit Court of Appeals sitting *en banc*, concluded that Petitioner was unable to utilize the new Act in support of her claims. Five judges joined the majority opinion, two judges signed a concurring opinion, and four judges signed three dissenting opinions. Additionally the two judges concurring and earlier Seventh Circuit precedent held *Patterson* was to be retroactively applied. *See McKnight v. General Motors Corp.*, 908 F. 2d 104 (7th Cir. 1990)

A. Factual Background

Petitioner Irene Mojica was hired in 1979 as a disc-jockey (radio announcer) for Respondent's radio station in Chicago: WGCI-FM[3] The station serves a predominantly black radio audience but styled itself an "Urban contemporary" station. As openings became available petitioner, who in the last seven years had been assigned only to the "Overnight shift" from 1:00 am to 5:00 am applied for full time positions in non-overnight shifts. Five vacancies occurred during this period four of which were filled by black disc jockeys and one by a Hispanic female. Petitioner was never chosen for any of the positions despite her high ratings as compared to other disc jockeys in evaluations and surveys.

Petitioner testified that one of Respondent's managers had told her that he would not assign her to a non-overnight shift because she was not "A black male."

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[3] The station also previously used the call letters "WVON" and had an AM station as well.

B. Procedural Background

On July 6, 1990, Mojica filed her suit under the Equal Pay Act and Title VII, and for sexual harassment and national origin discrimination under Title VII and 42 U.S.C. Section 1981. Trial was scheduled for December, 1991.

In November, 1991, Congress passed the Civil Rights Act of 1991. Petitioner sought leave of the district court to amend her complaint in accord with the new Act. The motion was granted. The district court determined that the new Act was retroactive and allowed Mojica to proceed on her amended complaint. [4]

Trial was conducted two weeks later. all her claims were tried before a jury. The district court submitted a combined instruction to the jury for the national origin claims under Title VII and section 1981. The jury returned a verdict in favor of Petitioner in the amount of $35,000.00 for compensatory damages and $125,000.00 in punitive damages.

Respondent filed a motion for Judgment Notwithstanding the Verdict with the district court. It argued punitive damages should not have been awarded since malice was insufficiently supported by the jury's verdict; that the 1991 Civil Rights Act should not apply retroactively; and that there was no factual support for the jury's determination of liability. The district court granted the Respondent's motion in-so-far as it requested dismissal of the award of punitive damages but denied the motion in all other respects and added further injunctive relief and backpay damages to make Petitioner whole.

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[4] *Mojica v. Gannett Company, Inc.*, 779 F. Supp. 94 (N. D. Ill. 1991, Judge William T. Hart presiding)

C. The Court of Appeals Decision

Gannett filed a timely appeal of the district court's final order. the panel which originally heard oral argument determined that Petitioner should have been permitted to avail herself of the new Act.[5] The court *sua sponte* determined that the matter should be reargued before the entire Circuit *en banc*. The Seventh Circuit stated the issue to be whether "the presumption against retroactivity applied to cases which were pending in the trial court when the new Act passed into law." 1a. The appellate court ultimately came to the opposite conclusion as the district court.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S REFUSAL TO APPLY THIS COURT'S DECISIONS CONCERNING RETROACTIVITY OF NEW STATUTES TO PROCEDURAL ISSUES AND SUBSTANTIVE CLAIMS IS CONTRARY TO THE DECISIONS OF THIS COURT AND IS IN CONFLICT WITH THE OPINION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

The Seventh Circuit's reading of the Court's opinion in *Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990), confirms a fundamental misunderstanding of the application of new congressional mandates to existing litigation. The Seventh Circuit's refusal has resulted in the inconsistent application of fundamental employment law

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[5] *Mojica v. Gannett Company, Inc.*, 986 F. 2d 1158 (7th cir. 1993)

principles with profound inconsistent results nationwide. Mojica has now lost her right to the benefit of peer review of her discrimination claim and her statutory remedy.

The issue of retroactivity of the Civil Rights Act of 1991 is presently under consideration by the Court. Precisely the same issues on review in *Landgraf v. USI Film Products*, No. 92-757 (1993), were discussed at oral argument by the court on October 13, 1993. Those questions include whether the legislative record of the Act is clear, whether the remedies are indeed new, and whether the processes can be considered substantive or procedural in nature. Clearly, the Act did not establish a new course of action for the Petitioner to take advantage of. Peer review and punitive damages had been available to persons illegally discriminated against on the basis of race for decades.

In any event, it is plain that the new Act can apply to pending cases in some form as the Solicitor General has argued in *Landgraf*. The dissenting judges in the Seventh Circuit argued that retroactivity to extant cases pending trial at the time of enactment, was applicable to Petitioner's case.

The position of the Seventh Circuit is contrary to the decision of the Ninth Circuit in *Reynolds v. Martin*, 985 F. 2d 470 (9th Cir. 1993). The Seventh Circuit recognized the existence of this conflict in its opinion at note 4. 7a. Moreover, as Judge Ripple argued in dissent below, the Seventh Circuit should have stayed its action pending the outcome of *Landgraf*. 33a. However, the *en banc* court below chose to issue its decision forthwith on its view that judicial resources had been significantly consumed already without considering the effect on Petitioner's or Respondent's rights. 7a n.5. Judicial resources are less likely to be consumed if that court had held the case pending the decision in *Landgraf*.

This case presents the important issue of retroactivity jurisdiction raised in thousands of employment cases nationwide. The outcome of this case hinges upon the Court's expected determination of the *Landgraf* case. If the outcome of *Landgraf* is to apply the Civil Rights Act of 1991 retroactively, then *certiorari* may be granted and returned to the Seventh Circuit with instructions to apply the *Landgraf* rule. If retroactivity is not found in *Landgraf*, then the remaining issues of the interpretation of *Patterson v. McLean County Credit Union*, 491 U.S. 164 (1989) must be resolved by the Court and *certiorari* should be granted to resolve those issues.

II.

THE SEVENTH CIRCUIT'S APPLICATION OF THE OPINION IN *PATTERSON V. MCLEAN CREDIT UNION* TO REVERSE THE VERDICT OF A JURY IN A CASE TRIED AFTER THE ENACTMENT OF THE CIVIL RIGHTS ACT OF 1991 INVOLVING INCIDENTS OF DISCRIMINATION OCCURRING PRIOR TO THE ANNOUNCEMENT OF THE DECISION IN *PATTERSON* IS CONTRARY TO THE DECISIONS OF THIS COURT

Should this Court refuse to grant retroactive application to the Civil Rights Act of 1991 it would open anew the Pandora's box closed by the Congress. The inevitable consequence would be to release all the knotty subsidiary issues left in *Patterson's* wake. A veritable jurisprudence would have to be crafted for application to employment discrimination cases pending during the 1989 to 1991 reign of *Patterson v. McLean County Credit Union*, 491 U.S. 164 (1989). The Petitioner's case illustrates the point vividly.

The Petitioner's charge of discrimination filed with the Equal Employment Opportunity Commission alleged that from a time prior to the decision in *Patterson v. McLean County Credit Union*, 491 U.S. 164 (1989) Petitioner had been subjected to discriminatory promotional practices. (See pg. 8 of Judge Hart's opinion, appendix 69a) The trial of this matter occurred after the passage of the new Act.

The Seventh Circuit has held that *Patterson* is to be applied retroactively to any cases pending after its announcement. See *McKnight v. General Motors*, 908 F. 2d 104 (7th cir. 1990)

This Court has not ruled on the retroactivity of the *Patterson* decision. Nonetheless it implicitly held open the door of nonretroactivity by failing to reverse a decision pending after *Patterson* involving post-formation liability under section 1981. *See Jett v. Dallas Independent School Dist.*, 491 U.S. 701 at 711 (1989) A contrary result would have been dictated had *Patterson* applied retroactively.

This Court set out the test of nonretroactivity in *Chevron Oil co. v. Huson*. 404 U.S. 97 at 106-107 (1971). All three factors counsel nonretroactivity in the case of *Patterson*.

That *Patterson* broke new ground cannot be fairly denied. The four dissenting Justices (Blackmun, Brennan, Marshall and Stevens) made it clear that prior to *Patterson* the employment discrimination landscape under section 1981 was quite different. 491 U.S. at 189-222 The second factor to be examined is the purpose of the new rule. Here the new rule was allegedly to act in accord with congressional intent. As the dissenters also made it clear and were later borne out by Congress actions in enacting the 1991 Civil Rights Act, faithful adherence to Congressional intent would not be served by retroactive application of the new rule.

The last factor to be considered under *Chevron* is equity. Clearly the equities weigh heavily in favor of Petitioner and similarly situated employees' right to peer review since, as Judge Hart said, "The parties do not have a substantial right to a bench trial." Pg. 8 of Judge Hart's opinion. 69a. [6]

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[6] It is noteworthy that even under Title VII a court may empanel an advisory jury, Rule 52(a) Federal Rules of Civil Procedure

For all the above reasons *Patterson* should not have beeN applied retroactively even prior to the passage of the Act. Since the passage of the Act even more compelling reasons exist for nonretroactivity. [7]

The Civil Right Act of 1991 superceded *Patterson*. As Judge Hart opinion makes clear the statute expressly states that it was designed to overturn *Patterson* because *Patterson*, in the eyes of the Congress, was not faithful to its intentions with respect to section 1981. (Pg. 5 of Judge Hart's opinion, 66a)

The Seventh Circuit opinion is at odds with this Court's opinions. Thousands of cases involving pre-*Patterson* incidents of discrimination would go without redress by retroactive application of *Patterson v. McLean County Credit Union*, 491 U.S. 164 (1989). As such, failure to hold that the 1991 Act is retroactive requires a determination of this issue of retroactivity of the new *Patterson* rule.

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[7] As the majority stated in *Patterson*. "...Congress may alter what we have done by amending the statute." 491 U.S. at 175 n. 1

III.

PATTERSON V. MCLEAN CREDIT UNION DOES NOT REQUIRE REVERSAL OF THE JURY VERDICT THAT PETITIONER WAS DISCRIMINATORILY DENIED PROMOTIONAL OPPORTUNITIES WHERE THE PROMOTION INVOLVED A NEW AND DIFFERENT RELATIONSHIP

Even under *Patterson v. McLean County Credit Union*, 491 U.S. 164 (1989) the Court recognized that whether section 1981 applies to a promotional case depends upon the nature of the change in position. If the change was such that it involved the opportunity to enter a new relationship then the employer's discriminatory actions in this regard were actionable under section 1981. This involves a factual determination.

The jury heard that changes in shift assignments carried with them changes in public exposure, salary differences and differences in the terms and conditions of employment. Clearly the jury could find the changes in shift assignments sought by Petitioner were the sort still actionable under section 1981.

The test set out in *Patterson* by this Court has never been applied by this Court. Even in *Patterson v. McLean County Credit Union*, 491 U.S. 164 (1989) itself, the case was remanded for reconsideration by the lower courts. If retroactivity of the Act is not accorded this issue must also be addressed by this Court. The instant case represents the thousands of cases laboring under *Patterson* which await determination of this issue. For this reason *certiorari* should be granted in this case to clarify this matter as well.

IV.

PATTERSON V. MCLEAN CREDIT UNION DOES NOT REQUIRE REVERSAL OF THE DISTRICT JUDGE'S FINDING THAT PETITIONER WAS DISCRIMINATORILY DENIED PROMOTIONAL OPPORTUNITIES

In the instant case the district court found that Petitioner had been discriminated against. (Judge Williams opinion, pg. 2, 55a; 3, 56a; 5, 58a. At best if *Patterson v. McLean County Credit Union*, 491 U.S. 164 (1989) applied to the case the Respondent would have been entitled to a bench trial. As previously stated the district court has always been permitted to empanel an advisory jury.

Significantly this Court has never held that Title VII litigants are not entitled to a jury trial. *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 at 547 n. 1 (1990)

Respondents, therefore, received what they argue they were entitled to. Nonetheless, the appellate court reversed and remanded for a new trial. Even under *Patterson v. McLean County Credit Union*, 491 U.S. 164 (1989) the Court only required that the district court take actions which were consistent with the Court's opinion.

Again one is faced with one of the unclarified *Patterson* issues if the Act is not retroactive, whether a case tried to a jury must be remanded and reconsidered or retried. This Court has not decided that issue. Petitioner and thousands of other employees need clarification from this Court on their rights if the Act is not retroactive.

CONCLUSION

For these reasons, Petitioner respectfully requests that a writ of *certiorari* issue to review the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 91-3921 & 92-1104

IRENE MOJICA,

Plaintiff-Appellee/
Cross-Appellant,

v.

GANNETT COMPANY, INC., owner of WGCI-FM Radio Station,

Defendant-Appellant/
Cross-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 90 C 3827—**Glen M. Williams**, *Ordering Judge.*
William T. Hart, *Presiding Judge.*

ARGUED JUNE 2, 1993—DECIDED SEPTEMBER 27, 1993

Before BAUER, *Chief Judge*, and CUMMINGS, CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, and ROVNER, *Circuit Judges.*

MANION, *Circuit Judge.* Irene Mojica, an Hispanic female, worked the "graveyard" shift as the overnight disc jockey at a popular Chicago radio station, WGCI-FM, owned by Gannett Company, Inc. In July 1990 she sued Gannett claiming, among other things, sex and national origin discrimination under 42 U.S.C. §§ 2000e-2 (Title VII) and 42 U.S.C. § 1981, because she had never been promoted into

a better time slot. A few weeks before the scheduled trial, Congress enacted the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071-1099. The district court applied the new law retroactively, and the jury awarded Mojica compensatory and punitive damages for her national origin discrimination claim. Gannett then filed a Motion for Judgment Notwithstanding the Verdict. The district court ruled on that motion by reversing the punitive damages award—finding insufficient evidence of malice—but otherwise letting the verdict stand. Gannett appeals the district court's failure to grant j.n.o.v. on the jury's finding of discrimination. Mojica cross-appeals on the district court's decision to strike the punitive damages award.

I. Facts

WGCI-FM is a popular Chicago radio station with programming geared for a black audience. To attract the maximum number of possible listeners, WGCI-FM separates its programming into six air shifts: 1:00am - 5:00am (overnight); 5:00am - 9:00am (morning drive); 9:00am - 2:00pm (mid-day); 2:00pm - 6:00pm (afternoon drive); 6:00pm - 10:00pm (evening shift); and 10:00pm - 1:00am ("quiet storm"). The format for each shift differs depending upon the presumed tastes of expected listeners. For instance, the morning and afternoon drive-time shifts—which attract by far the largest audiences—involve the chatter of the disc jockeys, along with some music, news, and traffic information. The other shifts are music-oriented, with different musical sounds appropriate to the pace and mood of the time of day.

Gannett hired Mojica in 1979, and she held several positions with WGCI-FM and its predecessor, WVON-AM. In January 1987, Mojica became the full-time overnight disc jockey at WGCI-FM. The overnight shift attracted the smallest listening audience and Mojica was paid less than the other disc jockeys at the station. She sought promotion into one of the more lucrative time slots. Between the time Mojica first became the full-time overnight disc jockey and the time she filed suit, five positions became

available in non-overnight shifts at WGCI-FM. Four of those positions were filled by black disc jockeys, and one position—the "quiet storm" position which became available in January 1990—was filled by an Hispanic woman, Anna "Coco" Cortez. Mojica remained stuck in the overnight shift.

On July 6, 1990, Mojica filed suit against Gannett in the district court, alleging that she was paid less than male disc jockeys in violation of the Equal Pay Act (29 U.S.C. § 206(d)) and Title VII, and sexually harassed in violation of Title VII. She also claimed that she was denied promotion on the basis of her sex, her national origin, and in retaliation for her complaints of discrimination, in violation of Title VII and 42 U.S.C. § 1981. Discovery proceeded and the district court scheduled trial for early December 1991. But in mid-November, Congress enacted the Civil Rights Act of 1991, thereby amending the prevailing civil rights laws. The district court determined that the new Act applied retroactively. On November 27, 1991, the district court allowed Mojica to amend her complaint to assert claims under the new Act.

Two weeks later, the district court conducted the trial. All of Mojica's claims were tried to a jury. Mojica presented evidence that while she was the overnight disc jockey, five disc jockey positions became available in more lucrative shifts. She applied for each position but the station did not promote her. To prove that the failures to promote were motivated by discriminatory intent, Mojica introduced evidence that she was a popular disc jockey. She also introduced the testimony of Anna "Coco" Cortez, an Hispanic female disc jockey who was hired into one of the positions for which Mojica was passed over. Cortez testified that she was not given the salary which the station promised, and she eventually left her job because of that. Finally, and significantly, Mojica testified that in the winter of 1986, the station's general manager, Marv Dyson, told her that he would not assign her to a non-overnight shift because she was not "a black male." He denied ever making that comment.

The district court gave the jury a combined instruction on Mojica's national origin claims under section 1981 and Title VII. The jury returned a verdict in favor of Mojica on this combined national origin claim, and awarded her $35,000 in compensatory damages and an additional $125,000 in punitive damages. Mojica failed on all of her other claims. After trial, Gannett filed a motion for j.n.o.v. The district court granted Gannett's motion on the punitive damages award, finding insufficient evidence of malice to support the award. The district court otherwise denied Gannett's motion, and let stand the jury's finding of discrimination and its $35,000 award to Mojica. Gannett appeals that denial of its motion. Mojica cross-appeals the district court's decision to strike the punitive damages award.

II. Analysis

In making its decision to apply the new Act retroactively, the district court faced a somewhat uncharted course. Congress had made no definitive statement in the text of the new Act as to whether it should apply retroactively. *See Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929, 932 (7th Cir.), *cert. denied*, 113 S.Ct. 207 (1992) ("whether Congress intended prospective or retroactive application of the 1991 Civil Rights Act cannot be deciphered from either the language of the statute or from the legislative history.") Without congressional guidance, the district court was forced to resolve the issue of retroactivity based on existing judicial precedent. But two distinct lines of cases emanated from the Supreme Court of the United States. One line of cases endorsed a presumption in favor of retroactive application unless the statute included a clear legislative statement to the contrary. *See Bradley v. School Bd.*, 416 U.S. 696, 711-712 (1974); *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268 (1968). A second line of cases rejected retroactivity, and observed a presumption favoring prospective application of newly-enacted statutes. *See* cases cited in Justice Scalia's concurrence in *Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990). Upon reaching this

fork in the road, the district court chose the *Bradley-Thorpe* path and applied the Civil Rights Act of 1991 retroactively.

In the time since this case was tried, this court has addressed and resolved the conflicting Supreme Court precedent on the issue of retroactivity in *Mozee* and *Luddington v. Indiana Bell Co.*, 966 F.2d 225 (7th Cir. 1992). Both *Mozee* and *Luddington* concerned the applicability of the Civil Rights Act of 1991 to cases which were pending on appeal when the new Act became effective. In *Mozee*, we extensively discussed the prevailing precedent and concluded that "the Supreme Court has left us with two seemingly contradictory lines of cases. . . ." *Mozee*, 963 F.2d at 935. We resolved this contradiction by establishing a presumption against retroactive application of newly-enacted statutes, stating the general rule that "statutory provisions impacting substantive rights and obligations will not be retroactively applied." *Id.* at 936. We reasoned that "the better and more fair rule is to hold parties accountable for only those acts that were in violation of the law at the time the acts were performed." *Id.* In *Luddington*, we reaffirmed the presumption against retroactivity: "[t]he idea that the law should confine its prohibitions and regulations to future conduct, so that persons subject to the law can conform their conduct to it and thus avoid being punished . . . is a component of the traditional conception of the 'rule of law.'" *Luddington*, 966 F.2d at 227-28. We specifically held that "the [Civil Rights Act of 1991] is applicable only to conduct engaged in after the effective dates (plural because several sanctions carry different effective dates) in the Act, at least if the suit had been brought before the effective date." *Id.* at 229-30.[1]

[1] In his dissent in this case, Judge Cummings observes that this opinion "all but ignore[s]" the Civil Rights Act of 1991, and instead relies on case law dealing with retroactivity. Cummings, J. dissent at 22. The problem, however, is not that we ignore the new Act, but that the new Act avoids the issue of retroactivity. We would have preferred to cite the text of the new Act. But for

(Footnote continued on following page)

We decided *Mozee* in May of 1992 and *Luddington* one month later.[2] The case now before the entire court was originally argued on October 19, 1992. In his dissent from the decision to rehear this case *en banc*, Judge Cummings describes the disposition of the panel which initially heard this case. *Mojica v. Gannett Co., Inc.*, 986 F.2d 1158, 1159 (7th Cir. 1993) (Cummings, J., dissenting from grant of rehearing *en banc*). To summarize, Judge Cummings took the position that the presumption against retroactivity established in *Mozee* and *Luddington* did not apply to this case. He noted that while those cases were pending on appeal when the new Act passed into law, this case was pending before the trial court. Judge Cummings and a second panel member[3] determined, for reasons essentially set forth in the dissent to the *en banc*, that Congress intended the new Act to apply to all trials taking place after the Act's passage. The proposed opinion was circulated to the full court under Circuit Rule 40(f), and a majority of the court decided to rehear this case *en banc*. *Id.* at 1158.

On rehearing, this case presents several issues. First, because the full court may decide to overrule previous cases, we must decide whether the presumption against retroactivity established in *Mozee* and *Luddington* should remain the law of this Circuit. Second, we must determine whether this presumption against retroactivity applies to cases which were pending in the trial court when the new Act passed into law. Third, we must apply our decision

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[1] *continued*
many reasons expressed in documents other than the statute, Congress chose to be silent on the issue of retroactivity—the issue which the court considers in this opinion. Absent precise language from the new Act, we must rely upon the presumption against retroactivity firmly established in this circuit's case law.

[2] We denied Rehearing and Rehearing *En Banc* in *Luddington* on September 4, 1992.

[3] Senior District Judge Frank A. Kaufman (D.Md.), sitting on the original panel by designation, concurred with Judge Cummings' position.

on retroactivity to the case before us. Finally, we must settle the other issues—unrelated to retroactivity—raised in this appeal and cross-appeal.

A. Retroactivity.

The Supreme Court has granted certiorari in a case involving the issue of retroactivity. *Landgraf v. USI Film Products, cert. granted,* ____ U.S. ____, 113 S.Ct. 1250 (1993). The rule stated in that case eventually will control the issue in the federal courts.[4] In the meantime, this court has already articulated a general rule concerning retroactivity in *Mozee* and *Luddington.*[5] When sitting *en banc*, the full court has the power to change general rules stated in previous cases. *See Varhol v. National R.R. Passenger Corp.*, 909 F.2d 1557, 1560 (7th Cir. 1990). As a practical matter, therefore, the first issue before us is whether the presumption against retroactivity should remain the law of this Circuit.

In his concurrence in *Kaiser*, Justice Scalia discusses the history of Supreme Court precedent relating to retro-

[4] Other circuits which have considered this issue have concluded overwhelmingly that the new Act does not apply retroactively. *See Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992); *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 113 S.Ct. 1250 (1993); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Vogel v. Cincinnati*, 959 F.2d 594 (6th Cir.), *cert. denied*, 113 S.Ct. 86 (1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Hicks v. Brown Group, Inc.*, 982 F.2d 295 (8th Cir. 1992) (en banc); *Baynes v. AT&T Technologies*, 976 F.2d 1370 (11th Cir. 1992). *Contra, Reynolds v. Martin*, 985 F.2d 470 (9th Cir. 1993) (concluding that the new Act applies retroactively).

[5] In his dissent, Judge Ripple notes that "it is a significant judicial diseconomy for this court to proceed to judgment" before the Supreme Court renders its decision in *Landgraf*. Ripple, J. dissent at 33. But this circuit has already expended its judicial resources resolving the issue of retroactivity in *Mozee* and *Luddington*. This case involves no more than a straightforward application of those two cases.

activity and expounds the policies against retroactive application of newly-enacted statutes. *Kaiser*, 110 S.Ct. at 1579-88. At the core of his discussion is the inescapable reality that retroactive application "is contrary to fundamental notions of justice. . . ." *Id.* at 1586. This is so because retroactive application often penalizes conduct which was acceptable, at least under the rule of law, when the conduct occurred. General retroactive application diminishes one's ability to conform conduct to the boundaries imposed by law. This does not mean that Congress is prohibited from retroaction. On the contrary, Congress may advance the will of the citizenry, in some circumstances, by changing laws after the fact. But our legal system leaves that authority exclusively to Congress, and places constitutional limits on its exercise. U.S. Const., Art. I, § 9. Courts should not presume retroaction. Instead, absent a clear legislative statement to the contrary, courts should presume that legislation was intended to operate only prospectively. *See Kaiser*, 110 S.Ct. at 1588.

In *Mozee* and *Luddington* we embraced Justice Scalia's conclusions from *Kaiser*. We see no reason to overturn those decisions. The weight of history and tradition, as well as considerations of fairness, compel us to observe a presumption against retroactive application of newly-enacted statutes. We need not repeat the reasoning displayed in *Mozee* and *Luddington*. Those cases remain the law of this Circuit, and they stand independently in their precedential value.

B. Mozee, Luddington *And This Case.*

The historical reason for applying statutes prospectively is to advance "[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place. . . ." *Kaiser*, 110 S.Ct. at 1586. Therefore, courts should look to the time of the conduct giving rise to the claim to determine the statute's applicability. Simply put, if the conduct took place before the statute's enactment, it is not covered;

if after, it is covered. In *Luddington* we followed this principle, holding that "the [Civil Rights Act of 1991] is applicable only to *conduct* engaged in after the effective dates . . . at least if the suit had been brought before the effective date." *Luddington*, 966 F.2d at 229-30 (emphasis added).

Mojica filed her lawsuit on July 6, 1990. The lawsuit necessarily followed in time the conduct upon which it was based; indeed, all of the alleged failures to promote occurred in 1989 and 1990. The new Act became law in November of 1991. That Mojica later amended her complaint to assert the new law does not change the fact that the conduct occurred (and the lawsuit was filed) before the effective dates. Under *Mozee* and *Luddington*, because the conduct giving rise to the claim occurred before the new Act became effective, Gannett is not liable under the new law. Gannett is potentially liable only under the civil rights laws in effect at the time it failed to promote Mojica.

In his dissent from the decision to rehear *en banc*, Judge Cummings took the position that the presumption against retroactivity established in *Mozee* and *Luddington* did not apply to this case. First, he made a distinction between our previous cases and this one: *Mozee* and *Luddington* were pending on appeal but this case was pending before the trial court when the new Act passed into law. Next, he discerned that Congress intended the new Act to apply to trials taking place after the law's passage, regardless of when the conduct giving rise to the claim took place. "[T]he Act is not addressed to employer's conduct, but rather to the conduct of federal judges administering trials under previously enacted civil rights laws." *Mojica*, 986 F.2d at 1162.

But this reasoning assumes that the trial, instead of the time of the alleged discriminatory conduct, is the temporal event which controls the application of the law. This assumption contradicts the holdings of *Mozee* and *Luddington* that the time of the conduct controls liability. It also ignores the reasoning behind those cases—that it would

be "unfair to make persons accountable for acts that did not violate statutory laws when they were performed." *Mozee*, 963 F.2d at 939; *accord Luddington*, 966 F.2d at 228. Under Judge Cummings' approach, Gannett could be liable for an alleged discriminatory failure to promote under section 1981, even though the law (section 1981) in effect at the time of the conduct did not prohibit such alleged discrimination. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (former section 1981 excluded claims based on failure to promote or transfer an employee, unless the "promotion rises to a level of an opportunity for a new and distinct relationship between the employee and employer. . . .").[6]

In theory, a statute may include certain procedural or damage provisions which do not impact substantive rights, and therefore should apply to trials taking place after enactment. *See Mozee*, 963 F.2d at 939 ("it is arguable that courts should apply the procedural and damage provisions in effect at the time of the trial."); *Luddington*, 966 F.2d at 228 ("[p]rocedural innovations not likely to bias a decision systematically in favor of one litigant rather than his opponent can, without serious affront to the values crystallized in the phrase 'rule of law,' be applied to cases pending when the innovations were adopted. . . ."). Indeed, courts are responsible to faithfully apply laws as Congress drafted them; if Congress intended certain non-substantive provisions of a law to apply to pending trials, then courts should so apply them. *See Ex parte Collett*, 337 U.S. 55,

[6] In his dissent in this case, Judge Cummings continues to assert that the time of the trial, rather than the time of the alleged discriminatory conduct, determines application of the new law. He expresses "wonder" over this court's position that the time of the conduct controls liability, and speculates that this position is rooted in our "imagination." Cummings, J. dissent at 24. To the contrary, our position is found in *Mozee* and *Luddington*, two cases which, as Judge Cummings agrees, state the law of this Circuit. *See* Cummings, J. dissent at 22 ("I have never questioned *Mozee* and *Luddington* as binding authority in this circuit.").

71 (1949) (new rule defining *forum non conveniens*); *Bonet v. Texas Co.*, 308 U.S. 463, 467 (1940) (new method of enforcing awards). But this case implicates only two provisions relating to procedure and damages, neither of which should have been applied at the trial. First, the district court allowed the Title VII claims to be tried to the jury, which was not allowed under the former Title VII but is permitted under the new Act. Second, the jury awarded compensatory and punitive damages, which were not recoverable under the previous Title VII.

To allow a jury trial for a case governed substantively by the former Title VII is to ignore the equitable nature of that provision. The amended Title VII allows for jury trials, but that is because of the legal remedies—including compensatory and punitive damages—available under the new law.[7] The previous Title VII allows only equitable remedies, and as long as that substantive law governs a case, the plaintiff has no right to trial by jury. *See Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1293 (7th Cir. 1987). Nor does the right to compensatory and punitive damages conferred by the new Title VII apply retroactively. As we stated in *Luddington*, "[t]he amount of care that individuals and firms take to avoid subjecting themselves to liability whether civil or criminal is a function of the severity of the sanction, and when the severity is increased they are entitled to an opportunity to readjust their level of care in light of the new environment created by the change." *Luddington*, 966 F.2d at 229.

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[7] The new Act makes clear that the right to a jury trial emanates from the availability of compensatory and punitive damages. Section 102(c) states:

> If a complaining party seeks compensatory or punitive damages under this section—(1) any party may demand a trial by jury; and (2) the court shall not inform the jury of the limitations described in subsection (b)(3).

See 42 U.S.C. § 1981a(c).

In sum, the district court erred by applying the new Act to this case. Because Gannett's alleged failure to promote Mojica--the conduct giving rise to her claim—took place before the enactment of the new Act, the former civil rights laws govern her case. To the extent some provisions of the new Act may apply to pending trials, no such provisions are implicated in this appeal.[8]

C. Consequences of Misapplication.

At trial Mojica alleged that Gannett violated federal laws by paying her less than other disc jockeys, by sex-

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[8] The dissents in this case make the argument that Congress intended the new Act to overrule several Supreme Court decisions, and that we should effectuate that intent. We disposed of the identical argument in *Luddington*:

> it would be naive to suppose that Congress sits to review the interpretive soundness of judicial decisions. Congress is not a judicial body, let alone a body of academic commentators on judicial decisions. When it 'overrules' a Supreme Court decision it is not registering disagreement with the merits of what the Court did; it is laying down a new rule of conduct—ordinarily for the future. Section 1981 dates back to 1866. It is as unlikely that Congress was attempting to restore section 1981 to the understanding of its framers as that *Patterson* in cutting back the earlier decisions had restored the statute to its original understanding. The new civil rights act reflects contemporary policy and politics, rather than a dispute between Congress and the Supreme Court over the mechanics of interpretation.

Luddington, 966 F.2d at 228. We stand by this statement from *Luddington*. Judge Easterbrook has issued a concurring opinion which builds on *Luddington*'s reasoning and develops the law in this area. We agree with the view stated in his concurrence—certainly, the concurrence is not a "superficial and wooden approach" and it does represent "reality." *See* Cudahy, J. dissent at 32. Like Judge Easterbrook, we follow the rule stated in *Luddington*—that Congress does not sit "to review the interpretive soundness of judicial decisions." *Luddington*, 966 F.2d at 228. What Judge Cudahy calls "manipulation of musty maxims" we prefer to call the law of this circuit. *See* Cudahy, J. dissent at 32.

ually harassing her, and by refusing to promote her because of her sex, her national origin, and in retaliation for complaining about discrimination. The jury found in Mojica's favor only on the national origin discrimination claim. Mojica does not appeal the jury's findings as to the other claims. The question before us, then, is whether the improper application of the new Act requires reversal of the jury's finding of national origin discrimination.

Mojica actually made two national origin discrimination claims: one under Title VII and one under section 1981. The court provided the jury with a combined instruction on that claim, and the jury returned one verdict. That Gannett engaged in national origin discrimination. The jury did not distinguish the statutory basis of the verdict; therefore it is impossible to know to what extent the jury assessed liability under Title VII as opposed to section 1981.

There are two problems with the jury's combined verdict. First, the jury should not have been allowed to consider the section 1981 claim. In *Patterson*, 109 S.Ct. at 2377, the Supreme Court held that the former section 1981—the law that governs this case—excluded claims based on the failure to promote or transfer an employee, unless the "promotion rises to the level of an opportunity for a new and distinct relation between the employee and employer. . . ." The amended section 1981 eliminated this requirement, effectively overruling *Patterson*. *See Harriston v. Chicago Tribune*, 992 F.2d 697, 702 n.3 (7th Cir. 1993). But Mojica's case should have been governed by the former law. Mojica presents no facts showing that the promotions to the more lucrative time shifts would have involved new and distinct relations with Gannett. *See id.* at 702. By allowing Mojica to proceed under the new Act, the district court essentially allowed her to proceed with a new claim which did not exist at the time the challenged conduct occurred.

The second problem with the jury's verdict was that under the former law, the jury should not have been allowed to consider Mojica's Title VII claims. True, under

the former law the jury was allowed to make factual findings if Title VII claims were tried with section 1981 claims. *See Handy Button*, 817 F.2d at 1293. But we have already held that the jury should not have considered the section 1981 claims in the first place. Therefore the jury's finding has no force. Even if we were to defer to the jury's factual finding of national origin discrimination, it would be impossible to reconcile the jury's damage award with the former Title VII. Indeed, the jury awarded $35,000 in "compensatory damages." The former Title VII allows recovery only for back pay and provides other equitable remedies. There is no way to determine at this point what portion of the jury's $35,000 damage award was meant to compensate for back pay.

The verdict is beyond rescue. This case must be remanded so that the district court can consider the Title VII discrimination claim. We decline to remand the section 1981 claim. Mojica offers no facts indicating that the promotions involved the opportunity to enter into a new and distinct contractual relationship.

D. Other Arguments.

1. Insufficiency of the evidence.

Under any version of the civil rights laws the plaintiff must prove discrimination. If Mojica did not prove discrimination at the first trial, the district court's failure to apply the proper civil rights laws would not matter. There would be no reason to remand to give Mojica a second chance to prove discrimination. Gannett argues that the evidence was insufficient to support the jury's finding of discrimination. If there was no evidence of discrimination presented at the trial, there is no reason to remand; this case would be over. Therefore, it is necessary to address Gannett's insufficency argument.

In any discrimination case, the plaintiff bears the ultimate burden to prove, by a preponderance of the evidence, that his employment was adversely affected by his

protected class status. *Kizer v. Children's Learning Center*, 962 F.2d 608, 611 (7th Cir. 1992); *Oxman v. WLS-TV*, 846 F.2d 448, 452 (7th Cir. 1988). The plaintiff can meet this burden either by presenting direct evidence of discrimination, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), or by successfully navigating the course of shifting burdens authorized in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See also St. Mary's Honor Center v. Hicks*, ____ U.S. ____, 113 S.Ct. 2742 (1993). But once the plaintiff prevails before a jury, the method of proof becomes extraneous. *United States Postal Serv. v. Aikens*, 460 U.S. 711, 715-17 (1983); *Mathewson v. National Automatic Tool Co., Inc.*, 807 F.2d 87, 90 (7th Cir. 1986). A district court passing on a motion for j.n.o.v. simply asks whether the substantial evidence supports the jury's finding of discrimination. *Id.* We review *de novo* the district court's decision. *Id.*

Mojica presented evidence of discrimination at the original trial by testifying that Marv Dyson, the station general manager, told her in 1986 that she would not be promoted into a more lucrative shift because she was not "a black male." She also testified that when she told her other superiors of Dyson's comment, they reacted as if Dyson had foolishly revealed a guarded company secret. One even responded: "He said that to you? He is not supposed to say that. You could charge him with discrimination." Gannett never objected to this testimony. Mojica also introduced evidence that she was a popular disc jockey and that the station had failed to pay another Hispanic woman disc jockey the amount that they had promised her. The district court found that the evidence was sufficient to support the finding of discrimination.

To determine if there was substantial evidence, we must ascertain "whether the evidence presented, combined with all reasonable inferences that may be drawn from it, is sufficient to support the verdict when viewed in the light most favorable to the party winning the verdict." *Mathewson*, 807 F.2d at 90. We do not make credibility determinations; we leave that to the jury. *Id.* The jury could

have believed Mojica's testimony about Marv Dyson's statement. If they believed that testimony, as well as Mojica's other testimony about how the other station supervisors reacted to the statement, the jury could have reasonably inferred that the radio station had a policy against hiring Hispanic females into prime-time disc jockey positions. Gannett never made a bona fide occupational qualification defense; it never argued that being a black male was a necessary qualification for a prime time disc jockey at a radio station with programming aimed at a black audience. Gannett argues simply that Marv Dyson never made the statement. But the jury could have believed Mojica. Because we conclude that the verdict is supported, we need not comment on any of the other evidence Mojica relied on to prove discrimination.

2. Mojica's cross-appeal.

Mojica cross-appeals, arguing that the district court incorrectly overturned the jury's punitive damages award. The district court determined that there was insufficient evidence of malice to support the award of punitive damages. We agree. But in accordance with our decision on retroactivity, we affirm the district court's decision to strike punitive damages because under the former Title VII—which applies to this case—Mojica is not entitled to punitive damages.

III. Conclusion

The district court erred by applying the Civil Rights Act of 1991 retroactively to this case. We reverse the jury's verdict and remand for a bench trial solely on the issue of whether Gannett committed national origin discrimination under the former Title VII. If so, the district court should award appropriate damages.

REVERSED AND REMANDED.

EASTERBROOK, *Circuit Judge*, with whom BAUER, *Chief Judge*, joins, concurring. Our case is governed by the venerable rule that substantive changes in the law apply prospectively unless Congress expressly says otherwise. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1988); *Bennett v. New Jersey*, 470 U.S. 632, 639-40 (1985); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801). Congress did not say otherwise expressly or even by clear implication, and I therefore join the majority's opinion.

Judge Cummings' dissenting opinion, rejecting the rationale of *Reynolds v. Martin*, 985 F.2d 470, 473-74 (9th Cir. 1993), concedes that Congress did not make an explicit decision. What then entitles Mojica to the benefits of the Civil Rights Act of 1991? The answer, according to the dissent, is that Congress did not change the law. It simply "overruled" some maverick decisions, including *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), restoring the law to its true state. Because "Gannett's conduct was illegal under 42 U.S.C. §§ 1981 and 2000e until the Supreme Court decided *Patterson*" (dissent at 23), we need not worry about retroactivity. The majority adopts the reasons *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225, 228-29 (7th Cir. 1992), gave for rejecting a similar argument. Everything *Luddington* said on the topic is persuasive. I write separately to add a few thoughts in light of the weight the dissenting opinion accords to this subject.

Committee reports and articles in law reviews often speak of Congress "overruling" the Supreme Court, but like many a term chosen for rhetorical rather than analytical purposes the usage is ambiguous. Does it mean "The Supreme Court misunderstood the statute in force when it acted"? or does it mean "The legal rule the Supreme Court found in the existing statute is not the rule we prefer"? The former implies that the "overruling" statute regulates events that occurred before its enactment, for the new law ensures continuing operation of a rule that has been on the books all along. The latter implies prospective application, just like any other change in the law.

Congress often concludes that existing rules are inadequate and provides new ones that it thinks superior. That the inadequacies in the existing statutes have been revealed by judicial decisions, rather than by the plaints of lobbyists, does not imply that a revision in the text of the United States Code is anything other than a spanking new rule of law.

Patterson and the other decisions "overruled" by the 1991 Act interpreted statutes dating as far back as the Civil Rights Act of 1866. When rejecting the result of *Patterson*, Congress and the President did not offer deeper insight into the text or structure of the 1866 Act, which does not speak to promotions—indeed, scarcely speaks to private conduct. Until 1968 judges uniformly understood the 1866 Act as limited to state action—requiring states to offer the same legal remedies to all citizens (so that black and white citizens had identical capacity to form and enforce contracts), but not requiring private parties to make contracts on particular terms, or at all. See *The Civil Rights Cases*, 109 U.S. 3, 16-17 (1883); *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926); *Hurd v. Hodge*, 334 U.S. 24, 31 (1948). *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), gave the part of the 1866 Act that now appears in 42 U.S.C. §1982 a broader reading, covering much private action. It was roundly criticized, not only by Justice Harlan in dissent, *id.* at 449-80, but also by legal historians, for misreading both the text and background of the 1866 Act. E.g., Charles Fairman, VI (1) *History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88* 1207-60 (1971); Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89. Eight years later *Runyon v. McCrary*, 427 U.S. 160 (1976), extended *Jones* to litigation under §1981. Four Justices wrote separately to wrestle with an important issue of *stare decisis*: should *Jones*, which they considered wrongly decided, be extended? Justice Stevens began: "For me the problem in these cases is whether to follow a line of authority which I firmly believe to have been incorrectly decided." 427 U.S. at 189. Two Justices (Powell and Stevens) answered yes; two (White and Rehn-

quist) answered no. Chief Justice Burger and Justice Blackmun, who joined the Court after *Jones*, did not communicate their view of that opinion's interpretation of the 1866 Act.

After *Runyon* held that §1981 applies to private and public contracts alike, intermediate courts had to decide what this means in practice. When asking questions such as "Does a failure to promote an employee because of that employee's sex violate §1981?", federal judges no longer returned to the materials from 1866. Instead they asked about the reasoning of *Jones* and *Runyon*. How far had the Supreme Court gone? What were the Justices likely to instruct them to do next? Neither *Jones* nor *Runyon* dealt with promotions or discharges; indeed, neither dealt with discrimination on account of sex or national origin. Several courts of appeals held after *Runyon* that a failure to promote an employee because of that person's sex was actionable; the fourth circuit disagreed. 805 F.2d 1143 (1986). *Patterson* became a *cause célèbre* because, after granting certiorari to resolve the conflict and hearing oral argument, the Court requested briefs and reargument on the question whether *Runyon* should be reconsidered. 485 U.S. 617 (1988). Because *Runyon* depended on *Jones*, the order called into question the application of the whole 1866 Act to private action. In the event, the Court overruled neither *Runyon* nor *Jones*—but it also declined to extend them. It said that *Runyon* itself was as far as it was willing to take the holding of *Jones*. Section 1981 establishes equal rights to "make and enforce" contracts; adopting rules for modifying and ending contracts is a legislative task, the Court concluded.

Congress accepted the invitation but encountered problems in the details. It is easy to say that discriminatory failure to promote should be actionable, but does this mean that employees must use administrative remedies (as under Title VII), or may they proceed straight to court as under the 1866 Act? What statute of limitations will apply—the short federal one under Title VII, or the longer state rules under §1988? What remedies are available—back pay as under Title VII, or compensatory and puni-

tive damages? What price can the opponents of any change extract? The 1991 Act contains compromises on many topics. The compromises were essential to its enactment. Both the nature of the question before the Court in *Patterson* and the nature of the legislative response show that Congress did not "overrule" *Patterson* in the sense of concluding that *Patterson* misunderstood the Civil Rights Act of 1866. The true meaning of that Act was not even before the Court (unless it was prepared to revisit *Jones*); and once we pass from interpreting the law to interpreting prior judicial decisions, there is no easy answer to the question whether and how far a judge should press cases such as *Jones* and *Runyon*.

Nothing that Congress enacted offers a superior reading of the 1866 Act. What some Senators and Representatives may have thought about the original meaning of §1981 does not matter; only what the political branches of the government *agreed on* is law. Congress and the President did not agree that *The Civil Rights Cases* and all other opinions interpreting that statute during the first 102 years of its existence were wrongly decided and that Charles Fairman got his history wrong, that the serious debate in *Jones* and *Runyon* about the meaning of the 1866 Act and the scope of *stare decisis* was all pointless. Congress and the President jointly resolved a complex contemporary debate about how employers should behave, and what remedies are available if they do not.

Revisiting the merits of judicial decisions is not part of a legislator's job description. Congress legislates, writing laws rather than rewriting history. The political branches of government altered the text of §1981 (and several other laws) in order to alter legal obligations and penalties. Cf. *Robertson v. Seattle Audubon Society*, 112 S. Ct. 1407 (1992). The inability of legislative and executive branches to agree whether these new rules and penalties apply to employment decisions predating November 21, 1991, bucks the question to the judicial branch. And our branch of government has a rule governing such situations, a rule forged early in the nation's constitutional history and applied, with rare exceptions, for 200 years.

The difference between legislative and judicial roles in government supplies the answer to the dissenting opinion's observation that "[i]f we can tolerate retroactive application of court decisions, we should be able to tolerate retroactive application of statutes that overrule those decisions" (dissent at 28). *Patterson* was not "retroactive" in any interesting sense; it did not overrule any earlier opinion. It simply declined to extend *Runyon*. This meant, of course, that courts taking §1981 for all it could be worth had not read their tea leaves correctly, but resolving a conflict among the circuits in a particular fashion does not effect a retroactive "change" in the law. There was only one law, the 1866 Act, although there were divergent views about its meaning. So far as inferior courts within the federal judiciary are concerned, *Patterson* gives the one right meaning of §1981, as it stood between 1866 and 1991.

Litigants adversely affected by *Patterson* would not care about the difference between a failure to extend *Runyon* and a retroactive overruling of *Runyon*, but the judicial task is to carry out the law, not what people hope the law is. *Patterson* interpreted a statute that had been on the books for 123 years. Courts apply their interpretations to pending cases because the rule they are interpreting predates the parties' acts. Judicial interpretations "change the law" from (losing) litigants' perspective, but from the judicial perspective the process of interpretation aims at getting as close as one can to a meaning that predates the litigation. See *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510, 2516-18 (1993); *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2442-45 (1991); *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring), *id.* at 209-24 (Stevens, J., joined by Brennan, Marshall & Blackmun, JJ., dissenting).

Today we apply the 1866 Act to events that occurred while its original text was in force. Congress concluded that a different rule would best serve the nation in the future. Our part is to apply each statute to decisions taken during its reign.

CUMMINGS, *Circuit Judge*, with whom CUDAHY and ROVNER, *Circuit Judges*, join, dissenting. The majority offers a thoughtful and well-reasoned discussion of retroactivity cases, and if these cases could resolve the issues in Gannett's appeal I would join today's decision without reservation. However, the inquiry before us begins with a statute, the Civil Rights Act of 1991, which the majority has all but ignored.[1] The narrow issue presented here is whether Congress intended an enactment governing damage calculus and burdens of proof in discrimination cases to apply in future civil rights trials. The broader issue is whether *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir. 1992), and *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992), were correctly decided. I agree that "Courts should not presume retroaction" absent clear evidence of Congress' intent—but the Act's language and structure show that Congress intended it to apply to Mojica's trial. Therefore I respectfully dissent from the majority's conclusion on the narrow issue posed above. I have never questioned *Mozee* and *Luddington* as binding authority in this circuit. *Mojica v. Gannett Co.*, 986 F.2d 1158, 1165 (7th Cir. 1993) (Cummings, J., dissenting from the rehearing *en banc*). Since the majority treats *Mojica* as a referendum on those cases, however, it is appropriate to comment on an approach to the Act that those decisions may not have considered.

The genesis of today's dispute is easier to explain than the Supreme Court's decisions on retroactivity law—and hopefully that Court is poised to resolve the tension between *Bradley v. Richmond School Board*, 416 U.S. 696, 711, and *Bowen v. Georgetown Hospital*, 488 U.S. 204, 208. See *Landgraf v. USI Film Products*, 968 F.2d 427, and *Rivers v. Roadway Express*, 973 F.2d 490, certiorari granted, 113 S.Ct. 1250 (cases consolidated). The majority reads *Mozee* and *Luddington* to establish two propositions: first,

[1] Pub. L. No. 102-166, 105 Stat. at 1071 (hereafter referred to as "the Act," and cited by statute and page number only).

that Congress expressed no intent about how the Act should apply to pending cases; and second, that the Act makes substantive changes in federal anti-discrimination laws that would be unfair to apply retroactively to conduct that occurred before the Act became law. In my view the Act (which after all is superior authority) points to a rather different conclusion in both areas.

True, the Act does not give perfect or complete instructions on the retroactivity issue, but this does not mean that the Act is silent on how it should apply to pending cases. The Act's language and structure suggest that while Congress could not agree whether the Act would apply to cases pending on appeal, it surely intended the Act to apply to new civil rights trials such as this. *Mozee* and *Luddington* do not bar the Act from applying here because where congressional intent is clear it controls, and there is no need to presume that the Act is prospective. *Kaiser Aluminum & Chemical Co. v. Bonjorno*, 494 U.S. 827, 837. My conclusion that the Act applies on its face to pending trials also draws support from the Act's focus on trial procedures, which typically take effect upon enactment without regard to the timing of underlying conduct.

The majority initially errs by forgetting that in Mojica's case, the Act did not create a new cause of action for intentional discrimination. *Harvis v. Roadway Express*, 973 F.2d 490, 495 (6th Cir. 1992), certiorari granted *sub nom. Rivers v. Roadway Express*, 113 S.Ct. 1250 ("the elements of a cause of action under § 1981 are identical to those under Title VII"). Mojica charged that Gannett denied her a more remunerative disk jockey shift because she was an Hispanic woman—and since a jury believed her we may assume that Gannett intentionally discriminated against Mojica. Discriminatory "shift assignments" or "failures to promote" have been illegal for decades. Gannett's conduct was illegal under 42 U.S.C. §§ 1981 and 2000e until the Supreme Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164. Between 1989 and 1991, Gannett's conduct was illegal only under Title VII (§ 2000e). Since the 1991 Act became law, the conduct is once again

also illegal under § 1981. The obvious point here is that the Act did not identify new *conduct*—the majority's emphasis—as illegal. Gannett's treatment of Mojica was unlawful before and after the Act was passed, and therefore holding Gannett liable would not make it "accountable for acts that did not violate statutory laws when they were performed" (Maj.Op. at 10). So when the majority asserts that "the time of the alleged discriminatory conduct [and not the time of trial] is the temporal event which controls the application of the law," (Maj.Op. at 9), it is fair to wonder just where this idea comes from—for the Act does not say this, and Congress' intent rather than our own imagination should control this case.

Turning then to the issue of Congress' intent, much of the Act resurrects remedies and procedures that had been undone by a well-publicized series of Supreme Court decisions in the late 1980s. Bluntly put, Congress passed the Act to overrule certain Supreme Court interpretations of civil rights law. The Act's first page disapproves of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, by name and states that the Act aims "to respond to recent decisions of the Supreme Court * * *." 105 Stat. at 1071. The House Report on the Act provides an even more graphic description of the statute's purpose. Its table of contents reads (section by section): "The Need to Overturn *Wards Cove* * * * The Need to Overturn *Price Waterhouse* * * * The Need to Overturn *Martin v. Wilkes* * * * The Need to Overturn *Lorance* * * * The Need to Address *Crawford Fittings* * * * The Need to Address *Zipes* * * * The Need to Address *Marek* * * * The Need to Address *Jeff D.* * * * The Need to Overturn *Patterson* * * *."[2] H.R. Rep.

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[2] *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642; *Price Waterhouse v. Hopkins*, 490 U.S. 228; *Martin v. Wilkes*, 490 U.S. 754; *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900; *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437; *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754; *Marek v. Chesney*, 473 U.S. 1; *Evans v. Jeff D.*, 475 U.S. 717; *Patterson v. McLean Credit Union*, 491 U.S. 164. *Estate of Reynolds v. Martin*, 985 F.2d 470, 475 n.2 (9th Cir. 1993), explains how the Act overrules these decisions.

No. 102-40(I), 102d Cong., 1st Sess. 1-3, *reprinted in* 1991 U.S.C.C.A.N. 549, 550-551. The Act works as a repudiation of Court decisions that had narrowed the scope of civil rights laws.

To say that Congress intended to overturn a group of cases may not tell us when, precisely, the overruling takes effect. But it tells us something. The act of overruling a case is not silent indifference as to whether that case is good law, nor is it tacit approval of the case's authority over future litigants. *Butts v. City of New York*, 990 F.2d 1397, 1407 (2d Cir. 1993) ("restorative language and intent [are] * * * one means of discerning congressional intent as to retroactivity"); *Reynolds*, 985 F.2d at 474-475. The Act accompanies its reversal of Supreme Court decisions with language that applies on its face to trials without reference to conduct. Sections 102, 104 and 105, for example, detail procedures and remedies to be used in future civil rights trials. Section 3 states that the Act aims to "provide statutory guidelines for the adjudication of disparate impact suits." Section 105(a) restores "the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.' " (*Wards Cove* was decided on June 5, 1989). If these sections are to take effect upon the Act's enactment, as Section 402 decrees, they should apply to new trials because they concern "guidelines for adjudication" and not conduct. All of this, I submit, is enough to reject the majority's decision that Congress was silent on how the Act should apply to new trials. Therefore *Mozee*'s presumption that the Act is prospective cannot apply to Mojica's post-Act trial. *Mojica*, 986 F.2d at 1162-1165 (Cummings, J., dissenting).

The harder question is whether Congress' intent to overrule a group of cases signals that the Act should be applied retroactively to all pending cases, and not just to new trials—and hence whether *Mozee* and *Luddington* were wrongly decided. On the one hand, just as Congress did not say anything about conduct, neither did it say anything about retrying cases that had been decided under the pre-Act regime of procedures and remedies decreed

by the Supreme Court. This is the weakness of the Ninth Circuit's reasoning in *Reynolds*, 985 F.2d at 473-474; just because Congress said that two of the Act's provisions apply prospectively does not mean that Congress meant the rest of the Act to apply retroactively. Congress could as easily have meant that it would express no opinion on the rest of the Act. And "retroactive application across the board would produce massive dislocations in ongoing litigation," *Luddington*, 966 F.2d at 229, whereas applying new procedures and remedies to new trials would produce no dislocations whatsoever.

On the other hand, this Court has recognized that "we have an obligation to give statutes their proper meaning rather than to perpetuate the effects of our own mistakes." *Kinney v. Pioneer Press*, 881 F.2d 485, 491 (1989). This adage argues that Congress' intent to overrule cases should apply retroactively to all cases pending when the Act became law. If *Kinney*'s admonition is taken seriously, we should explain why the ordinary meaning of "overturn" becomes subject to complex qualifications when the Act decrees that courts mistakenly interpreted civil rights law.[3]

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[3] Our account should probably go beyond a poker-faced denial that congressional overrulings exist. "When [Congress] 'overrules' a Supreme Court decision it is not registering disagreement with the merits of what the Court did; it is laying down a new rule of conduct—ordinarily for the future." *Luddington*, 966 F.2d at 228. This statement jars because the Act does not lay down new rules of employer conduct, and it registers express disagreement with what the Court did. See William N. Eskridge, *Overriding Supreme Court Statutory Decisions*, 101 Yale L.J. 331 (1991), for analysis of how often and why Congress overrules court decisions. Recent statutes that expressly disagree with "what the Court did" include the Older Workers Benefit Protection Act, Pub. L. No. 101-143 § 101, 104 Stat. 978 (1990), and the Civil Rights Restoration Act, Pub. L. No. 100-259 § 2, 102 Stat. 28 (1988).

When Congress overturns a recent court interpretation of a statute, this could raise a presumption that Congress intended its action to apply retroactively—with the same effect as a reversal by a higher court. Other circuits applied this reasoning to the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 § 2, 102 Stat. 28 (1988), which overruled *Grove City v. Bell*, 465 U.S. 555. *Lussier v. Dugger*, 904 F.2d 661, 664-665 (11th Cir. 1990); *Ayers v. Allain*, 893 F.2d 732, 754-755 (5th Cir. 1990), vacated on other grounds *sub nom.*, *United States v. Fordice*, 112 S.Ct. 2727 (1992) ("Retroactive application of a statute is appropriate when Congress enacts a statute to clarify the Supreme Court's interpretation of legislation thereby returning the law to its previous posture"). Such a presumption could be rebutted if the statute stated that it applied prospectively. Because most legislation does not aim to overturn court decisions, *Mozee*'s presumption that statutes apply prospectively would remain the general rule for all the persuasive reasons offered in that opinion. 963 F.2d at 936.

Surprisingly, perhaps, *Luddington* offers a theory to support the presumption proposed above. *Luddington* explains our general rule that statutes apply prospectively and court decisions apply retroactively as follows:

> [Without these presumptions] litigants might lack adequate incentives to seek legal change through the courts and courts might feel too free to make such changes * * *. Moreover, the power of a court to disturb settled expectations is held in check by the judicial tradition of incremental change and by the limited control that judges exercise over taxing and spending. A legislature has awesome power uncabined by a professional tradition of modesty and this power is held a little in check by the presumption that its handiwork is to be applied only to future conduct.

966 F.2d at 228. This is perfectly correct (except perhaps the remark about modesty)—but it is irrelevant when Con-

gress overrules a court decision because such an enactment involves the same powers as those exercised by a court. When a new statute only changes the procedures and costs of litigation—as does the Act—the effect of retroactive application on parties' incentives and settled expectations is the same as if a higher court had made the decision. The Act is not an exercise of Congress' awesome power to tax and spend. If we can tolerate retroactive application of court decisions, we should be able to tolerate retroactive application of statutes that overrule those decisions as well.[4]

Presuming that congressional overrides are retroactive also avoids the somewhat unfair results of *Mozee* and *Luddington* noted by Judge Cudahy's dissent in *Mozee*. 963 F.2d at 940-941. *Patterson* changed the law to deny relief for plaintiffs such as Mozee and Mojica who complained of conduct that violated § 1981 when it occurred.[5] When these claimants were before us we ignored the time of conduct and applied *Patterson* retroactively. *McKnight v. General Motors*, 908 F.2d 104, 107 (1990). After Congress

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[4] The concurrence's discussion of the original understanding of the 1866 Civil Rights Act fails to persuade me that congressional overrulings should be treated differently from judicial overrulings. Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), it has been "the province and duty of the judiciary to say what the law is." I completely agree that when Congress overruled *Patterson*, it was not debating the original meaning of § 1981—it was decreeing that § 1981 would mean what courts had said it meant before *Patterson*. The probative evidence of intent here is that the Act contradicted *Patterson*, and the propriety of deferring to the Act's view is neither enhanced nor diminished by the antiquity of § 1981. See Section 105(a), 105 Stat. at 1074 (restoring "the law as it existed on June 4, 1989"—one day prior to *Wards Cove*).

[5] The majority incorrectly implies that all of Gannett's discriminatory conduct occurred between 1989 and 1990 under the *Patterson* regime. Mojica, however, asserts that in 1986 Gannett denied her a promotion and told her to her face that she had not been given the job because she was an Hispanic woman.

restored § 1981 to its pre-*Patterson* position, however, we emphasized the time of conduct, applied a prospective presumption and denied relief again. *Luddington*, 966 F.2d at 228. Courts should avoid decisions that appear to create "heads I win, tails you lose" rules.

There are two sides to the fairness coin, of course, and the majority properly questions whether retroactive application of the Act is fair to Gannett. *Bradley*, 416 U.S. at 711. Two retroactive changes are at issue here. First, the Act allowed a jury to hear Mojica's Title VII claims. The majority protests that "[t]o allow a jury trial for a case governed substantively by the former Title VII is to ignore the equitable nature of that provision." (Maj.Op. at 11). So what? Cases following *Erie Railroad v. Tompkins*, 304 U.S. 64, teach that juries are procedural. *Simler v. Conner*, 372 U.S. 221; *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500. The majority admits that procedural changes in the law apply to cases pending when the new procedure is enacted—which means that Mojica should get a jury because her case went to trial after the Act became law.

The other retroactive change at issue is whether Gannett should face liability for compensatory and punitive damages (under § 1981 or Title VII) as an alternative to equitable relief (under Title VII alone) as a result of its discrimination against Mojica. Compensatory damages and back pay are similar awards here because they both describe the money that Gannett must pay Mojica to make whole her loss. It is perfectly fair to label Gannett's liability "compensatory damages" retroactively so long as the damages it may face are roughly comparable to its exposure under an equity regime. The majority's mantra that employers "are entitled to an opportunity to readjust their level of care" in response to the risk of greater liability (Maj.Op. at 11), quoting *Luddington*, 966 F.2d at 229, does not apply to compensatory damages, for it seems unlikely that such damages expose employers to greater risks than Title VII's equitable remedies. The Act's offer of compensatory damages and a jury option under Title VII

is thus a procedural change that must apply to new trials—if not to cases pending on appeal—under the majority's own analysis.[6]

Punitive damages present a more difficult issue. These aim to punish Gannett rather than to compensate Mojica; applying them here exposes Gannett to the risk of a significantly larger damage award, even though Section 102(b) caps liability at $300,000. But it does not take a social scientist to figure that the discounted risks of large punitive damages awards under the Act's "new" damages regime are probably slight compared to the fixed costs of responding to anti-discrimination laws. Therefore, holding employers like Gannett liable for punitive damages would not significantly raise the costs they might reasonably expect to incur under civil rights statutes. Since the *Patterson* regime turned out to be a two-year sabbatical from an earlier damages regime, now restored by the Act, there is nothing fundamentally unfair about holding employers retroactively liable for pre-*Patterson* punitive damages. *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 907-908 (D.C. Cir. 1992) (Wald, J., dissenting) (retroactive application of the Act would not disrupt employers' settled expectations). If the majority believes that punitive damages cannot fairly be applied retroactively, it should exempt employers from these awards rather than recasting Section 102 in its entirety as a substantive change in the law.

Only two provisions of the Act relevant to Mojica's case are arguably "substantive" enough that they should apply only to post-Act conduct: the punitive damages provision in Section 102, and Section 101's restoration of the traditional ban on discrimination in the performance of con-

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[6] Other sections of the Act are arguably procedural as well, and should apply to new trials. See *e.g.*, Section 105 (burdens of proof in disparate impact cases); Section 108 (non-party challenges to consent decrees); Section 113 (court-awarded expert fees).

tracts under § 1981. The decision below could be upheld without applying either of these provisions retroactively. The Act states that compensatory damages are available under Title VII "provided that the complaining party cannot recover under [42 U.S.C. § 1981] * * *." Section 102(a), 105 Stat. at 1072. Even if we decided that Section 101 did not apply retroactively and that Mojica therefore cannot recover under § 1981, Section 102(a) would still allow her to seek legal remedies under Title VII, and Section 102(c) would allow her to make a jury demand. Since there is no reason to fear that a jury given a blanket instruction on national origin discrimination would reach a different verdict without § 1981 as a redundant basis for liability, I would affirm the jury's verdict (as modified by the district court to overturn the punitive damage award). *Lytle v. Household Mfg., Inc.*, 494 U.S. 545; *Littlefield v. McGuffy*, 954 F.2d 1337, 1345 (7th Cir. 1992).

As between the approaches outlined above—applying the Act to post-Act trials, or applying the Act retroactively to all pending cases—I would favor the latter alternative if this were an issue of first impression. "The joint presumptions that court decisions apply retroactively while legislation operates prospectively have combined here to produce a result that is neither rational nor just." *Mozee*, 963 F.2d at 940 (Cudahy, J., dissenting). Because *Mozee* and *Luddington* resolved the difficult and distinct question of whether the Act should apply to cases pending on appeal, I see no reason to challenge their validity here. In the present case, however, this Court should honor Congress' intent to apply the Act to procedures in post-Act trials.

CUDAHY, *Circuit Judge*, with whom ROVNER, *Circuit Judge*, joins, dissenting. I am pleased to join Judge Cummings' eloquent and extraordinarily perceptive dissent. He has succeeded in introducing reality into what is so frequently a superficial and wooden approach to applying the Civil Rights Act of 1991. Even though *Mozee* and *Luddington* are now the law of this Circuit, I agree with Judge Cummings that, despite those cases, or perhaps because of them, the 1991 Act properly applies to Mojica's post-Act trial.

I, of course, emphatically dissented as a panel member from the court's refusal in *Mozee* to apply the 1991 Act to pre-Act and pre-*Patterson* conduct. The result in that case I regarded as incorrect and unjust. It seems to me that the manipulation of musty maxims and presumptions of retroactivity and prospectivity has managed to leverage the fleeting months when *Patterson* was on the books into a much longer and continuing denial of the full protection of the civil rights laws. The manifest intent of Congress, as well documented by Judge Cummings, was to obliterate as expeditiously as possible *Patterson* and a number of other Supreme Court decisions that narrowed and limited long-standing protections of the civil rights laws. As Judge Cummings points out, all parties have been on full notice of the substance of those protections for a long time; they certainly do not come as a complete surprise to Gannett or other defendants. The Act, insofar as I am concerned here, merely restored the law promptly to the course it had followed for years. It seems to me wholly unrealistic to believe that Congress wanted to endow *Patterson* and similar cases with some sort of life after death. Hence, I cannot countenance their continued application long after they have been legislatively erased from the books. I, therefore, respectfully dissent.

RIPPLE, *Circuit Judge*, with whom ROVNER, *Circuit Judge*, joins, dissenting. The Supreme Court of the United States has granted certiorari in two cases that will address the retroactivity of the Civil Rights Act of 1991. It is highly likely that the Court will address the fundamental dichotomy presented by the conflicting holdings in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) and *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). Once that basic issue is resolved, the more particular issues of retroactivity will be subject to relatively easy judicial resolution. Therefore, I believe it is a significant judicial diseconomy for this court to proceed to judgment in this en banc proceeding until that basic issue is resolved. I believe that the most appropriate course would have been to hold this case until after the Supreme Court renders its opinion.

If, despite the presently existing ambiguous precedent on retroactivity, we must deal with the merits at this time, I would hold that the Act is retroactive. Consequently, the prior panel holdings in *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992), and *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir. 1992), ought to be overruled. In my view, even if we indulge in the general presumption that statutes are to be applied in a prospective fashion, that presumption is nullified in this case by the explicit language of the statute. Whatever the motivations of Congress in casting the statute in these terms, we must accept its manifest intent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—9-27-93

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 91-3921 & 92-1104

IRENE MOJICA,

Plaintiff-Appellee,
Cross-Appellant,

v.

GANNETT COMPANY, INC.,

Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 3827—Glen M. Williams, *Visiting Judge.**

MARCH 4, 1993

PER CURIAM. Pursuant to Circuit Rule 40(f), on February 22, 1993, a majority of the members of this Court voted to hear this matter *en banc*, to decide whether the panel's proposed disposition of the matter conflicts with the holdings of *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir. 1992), and *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992). The date for the oral argument will be set in due course.

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* Judge Williams is Senior District Judge for the Western District of Virginia.

CUMMINGS, *Circuit Judge*, dissenting from the decision to rehear *en banc*.[1] On February 22, 1993, the Supreme Court decided to consider whether the Civil Rights Act of 1991 is retroactive. *Landgraf v. USI Film Products*, 1993 WL 42997 (U.S.), 61 U.S.L.W. 3371. All circuits to consider this question save the Ninth have decided that Congress did not intend to apply the 1991 Act retroactively to reopen cases tried before the Act. In the absence of such intent, a majority of circuits decided that they would not apply the Act retroactively to cases tried before the Act was passed. To my knowledge, however, no circuit has examined the separate question, presented here, of whether Congress intended the 1991 Act to apply to cases tried *after* its enactment. I think the 1991 Act shows beyond doubt that Congress intended it to apply to new trials brought after the passage of the Act. Therefore, I dissent from the decision to hear this case *en banc* on the grounds that *Mozee* and *Luddington* did not determine this question of Congressional intent, since it was not before them. Those cases should not apply to the claims brought in this case, which was tried after the 1991 Act was passed. I drafted the panel opinion that was circulated under Circuit Rule 40(f), and have decided to publish my views in order to better inform the parties about the issues that divide this Court.[2]

Irene Mojica, a female Hispanic-American, works as an overnight disk jockey for WGCI-FM, a radio station owned by Gannett Company that targets an African-American audience in the greater Chicago area. Mojica claims that WGCI promoted less qualified African-American men to prime daytime shifts instead of her, discriminating against

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[1] Circuit Judge Cudahy joined me in voting to deny the rehearing *en banc*.

[2] Senior District Judge Frank A. Kaufman (D.Md.), sitting by designation, joined in the panel opinion. Since he is not a member of this Court, he could not vote on whether *en banc* consideration was justified. Circuit Judge Manion dissented from the panel opinion and asked that it be circulated to the full Court under Circuit Rule 40(f).

her because she is an Hispanic woman. Her case brings before this Court for the first time the question whether and how the Civil Rights Act of 1991[3] may apply to a case tried after its enactment. Mojica argues that our recent opinions in *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir. 1992), and *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992), do not require us to overturn a jury verdict for national origin discrimination in her favor under 42 U.S.C. § 1981 and Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2. I agree. The Act expresses Congress' unambiguous intent to regulate—prospectively—the procedures and remedies of cases tried after the Act's passage. *Mozee* and *Luddington* decided that the Act would not apply retroactively to cases pending on appeal before the Act's passage. Because Mojica's case was tried after the Act was passed, *Mozee* and *Luddington* neither require nor allow this Court to disregard Congress' express intent to apply the 1991 Civil Rights Act to her trial.

I.

Gannett's radio stations divide their broadcasts into "shifts" based on the number and type of listeners attracted at different times of day. Day shifts bring more listeners than night shifts; more listeners generate higher advertising revenues; and so-called "drive-time shifts," when commuters are in their cars, earn the most listeners and the highest revenues of all. For disk jockeys, day shifts, and drive shifts in particular, offer higher profile jobs with higher salaries than night shifts. Mojica has worked for a Gannett-owned radio station since 1979, when she took a job as a part-time announcer on WVON-AM, then the AM counterpart to WGCI-FM. She worked a variety of shifts, including the drive shifts, until 1986, when WVON-AM began broadcasting the same programming offered on WGCI. Mojica then worked for WGCI-

[3] Pub.L.No. 102-166, 105 Stat. 1071-1100, hereafter referred to as "the Act."

FM as a part-time announcer. In January of 1987, WGCI gave her a job as a full-time overnight disk jockey ("DJ"), where she remained until July of 1989. She was relegated to part-time work for five months while the station tried a new overnight DJ, but in December of 1989 Mojica returned to her position as a full-time overnight DJ. Since she began working for WGCI in 1986, Mojica has applied for several non-overnight shifts that offered better salaries, more prestige (and presumably more congenial working hours). Rejected each time, she remains a full-time DJ on the 2:00-6:00 AM shift at WGCI.

Mojica filed suit against Gannett in the Northern District of Illinois on July 6, 1990. She charged Gannett with paying women less than men for comparable work, barred by the Equal Pay Act (29 U.S.C. § 206), sex discrimination barred by Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000(e)), national origin discrimination barred by 42 U.S.C. § 1981 and Title VII, and retaliation against Mojica for complaining about her treatment, barred by § 1981. On November 12, 1991, anticipating the passage of the Civil Rights Act of 1991, Mojica moved to amend her complaint to demand compensatory and punitive damages and a jury trial. The trial judge granted Mojica's motion on November 27, 1991, six days after the Act became law. Save for the jury demand and the alternate damages calculation afforded in one count of her six-count complaint, however, Mojica's amended complaint was identical to her original complaint. The amended complaint pled no new underlying events or theories of recovery. Trial took place before a jury on December 2-5, 1991. The jury found for Gannett on all claims except national origin discrimination; on that claim, Mojica won $35,000 in lost wages and $125,000 in punitive damages. On December 13, 1991, the trial judge partially granted Gannett's motion for judgment notwithstanding the verdict (j.n.o.v.) and overturned the punitive damages award. The court otherwise upheld the jury's verdict, however, and supplemented it with a series of three equitable pay increases of $5,000, to take effect on January 1 and July 1 of 1992, and January 1 of 1993.

Mojica's complaint argued that because she is Hispanic, WGCI promoted other announcers to better shifts and higher salaries who were less popular with listeners and who had less experience on the air. The evidence at trial showed that Mojica applied for six non-overnight shifts after she began working for WGCI-FM, and all but one were given to black men. She has not received a significant pay raise since 1981; she earns now as then around $30,000 a year (unless she gains relief in this Court). The two star drive-shift DJs at WGCI earn roughly ten times her salary; studies conducted in 1986 showed that Mojica's popularity ratings were within 10 percent of the second star DJ. All other DJs at WGCI rated equally or less popular than Mojica, yet all earn better salaries. Only the stars have more broadcasting experience than Mojica.

Mojica's testimony about her career at WGCI reveals a constant ambition to improve her performance and advance to a daytime or non-overnight shift. Beginning in the early 1980s, she regularly asked her supervisors what she had to do to advance her position at the station. She testified that in response to these queries, her supervisors gave her a variety of advice, and that she responded, experimenting with her style and her delivery. Her testimony also reveals that she became increasingly frustrated over her failure to advance, and was led to understand from conversations with her supervisors that her opportunities were limited because she was not black. She recalled one conversation in particular, occurring in 1986, where the station manager, Marv Dyson, told her that she had not received an evening shift because she was not a black male, and the station wanted a black male. Her testimony mentions other conversations as well, with Dyson or her supervisors, where she was told or she understood that her opportunities were limited because she was not black. The direct examination, however, did not offer approximate dates for all these conversations. Dyson denied ever making such comments.

Gannett argues as an initial matter that the evidence Mojica offered to prove national origin discrimination could

not support the verdict, and that the trial court should have granted Gannett's motion for j.n.o.v. in full. Gannett belittles Mojica's testimony as offering evidence of "a single statement allegedly made to her [by Marv Dyson in the early 1980s] * * * and allegedly repeated by him in 1986" (appellant's reply brief at 5). Passing over how Dyson's alleged remarks can be characterized as both a "single statement" and "repeated," Gannett offers nothing to rebut Mojica's allegation of several conversations other than Dyson's denials. The jury was entitled to credit Mojica over Dyson. A reasonable jury could find that Dyson's remarks, coupled with the evidence of Mojica's ratings and compensation as compared to other WGCI DJs, were enough to show that WGCI's reasons for promoting non-Hispanic men over Mojica were a pretext for discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792. Gannett correctly asserts that we review the denial of a j.n.o.v. motion *de novo*. *Bruno v. City of Crown Point*, 950 F.2d 355, 360 (7th Cir. 1991). But the jury's verdict in this case is supported by substantial evidence as required by *Aungst v. Westinghouse Electric Corp.*, 937 F.2d 1261, 1219-1220 (7th Cir. 1991), and the trial court properly denied Gannett's j.n.o.v. motion as to compensatory damages.

There remains Mojica's argument that we should reinstate the punitive damage award thrown out by the district judge on Gannett's motion for j.n.o.v. I agree with the trial judge that there was no evidence that Gannett's conduct showed "malice," "evil motive," "reckless" behavior, or "callous indifference." *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d. 508, 514 (7th Cir. 1986). The trial judge observed that Mojica had a friendly working relationship with her supervisors, including Marv Dyson. Intentional discrimination is not per se malicious, and the Act requires evidence of malice to support an award of punitive damages. Section 102(b)(1). Because there was no evidence of malice in this case, I would not reinstate the jury's punitive damage award.

II.

The second question in this case is whether the trial judge properly allowed Mojica to amend her complaint to ask for new procedures and remedies given to victims of discrimination by the Civil Rights Act of 1991. If correctly applied, the Act allowed Mojica to demand a jury trial and seek compensatory and punitive damages under Title VII and § 1981. If her case had been tried before the passage of the Act, her Title VII claims would not have gone to a jury—thus the Act allowed Mojica to use a different procedure to press her discrimination claims. While discriminatory shift assignments were illegal before and after the passage of the Act, the Act created a tougher remedy by allowing Mojica to claim compensatory and punitive damages under Title VII and § 1981, in addition to equitable remedies such as back pay previously offered by Title VII alone.

The retroactive application of the 1991 Civil Rights Act to previously decided cases has spawned a cottage industry in the Courts of Appeals. Although specific approaches varied from case to case, this Court and most others have held that Congress did not indicate (either in the statute or in legislative history) whether the Act would apply to cases pending on appeal. *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir. 1992); *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992).[4] Courts then examined the conflicting presumptions of retroactivity and prospectivity offered in *Bowen*

[4] See also *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992); *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1365 (5th Cir. 1992); *Vogel v. Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 886 (8th Cir. 1992); *Hicks v. Brown Group, Inc.*, 1992 Lexis 33730 (8th Cir. 1992) (en banc); *Baynes v. AT & T Technologies*, 976 F.2d 1370 (11th Cir. 1992). Contra: *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992) (finding that Congress intended to apply the Act retroactively to pending cases).

v. Georgetown Hospital, 488 U.S. 204, 208 ("congressional enactments * * * will not be construed to have retroactive effect unless their language requires this result"), and *Bradley v. Richmond School Board*, 416 U.S. 696, 711 ("a court is to apply the law in effect at the time it renders its decision"). *Mozee* concluded that *Bowen* stated the general rule, while *Bradley* "applies in very limited circumstances * * *." 963 F.2d at 938. Most previous cases thus decided that the Act did not require Courts of Appeals to reopen or re-examine cases tried and decided before the Act. Our decisions conflated two different types of retroactivity, however: because the Act did not apply retroactively to *trials* occurring before the Act was passed, we reasoned that the Act might not apply retroactively to *conduct* (i.e. discrimination) occurring before the Act was passed.

We have not been confronted with a case like Mojica's, which was tried after the passage of the Act, and here the Act requires a fresh approach. The Act shows by its own terms that Congress intended to regulate discrimination trials occurring after the Act was passed. For example, Section 3 provides: "The purposes of this Act are * * * [to] provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 * * *." Section 3 identifies the statute as one that creates guidelines for "adjudication." It leaves no room to wonder when courts should begin to use these guidelines. No matter that the Act's new guidelines may alter substantive outcomes: "where [] congressional intent is clear, it governs." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837; *Gay v. Sullivan*, 966 F.2d 1124 (7th Cir. 1992). Since Congress intended the Act to apply to new trials, judicial presumptions for or against retroactivity are irrelevant when, as here, trial occurs after passage of the Act. By creating a new regime for the adjudication of discrimination cases, Congress expressed its intent to hold parties responsible under judgments concerning conduct that occurred before the passage of the Act.

Previous discussions of this issue seem to assume that the Act must be either purely retroactive or purely pro-

spective. If the Act is purely retroactive, then courts must overturn old verdicts and order new trials under the new standards offered by the Act. If the Act is purely prospective, then courts may only apply it to conduct that occurs after the Act was passed. Neither approach is faithful to Congressional intent. Congress can distinguish between differing degrees of retroactivity, and it has done so in the Act. It has not ordered courts to reopen settled disputes, but it has ordered courts to apply the Act's provisions to new trials regardless of when the conduct at issue occurred. Thus the Act is both prospective, in the sense that it applies to new trials, and retroactive, in the sense that it ignores when the wrongful conduct occurred. The Act creates few new rules against discrimination, focusing instead on outlining new procedures and remedies to use in new trials. This should persuade the honest student of Congressional intent that the Act is not addressed to employer's conduct, but rather to the conduct of federal judges administering trials under previously enacted civil rights laws.

Section 102 sets out a new framework for adjudicating claims of intentional discrimination brought under Title VII.[5] Paragraph (d)(1)(A) defines a "complaining party" as "a person *who may bring* an action or proceeding under title VII," identifying future claims without qualification.[6] Paragraph (a)(1) provides compensatory and punitive damages "[i]n an action brought by a complaining party under [42 U.S.C. § 2000e-5] against a respondent who *engaged* in unlawful intentional discrimination." Paragraph (b)(2) explains that punitive damages will be available only where "the respondent *engaged* in a discriminatory practice with malice * * *." Paragraph (c) allows either party to demand a jury without distinguishing as to the timing of underlying claims. Section 102 thus modifies the procedural and

[5] This Section, though applicable to Title VII cases, is codified at 42 U.S.C. § 1981; it coordinates Title VII remedies with those offered by § 1981.

[6] Emphasis added in all this paragraph's quotations.

remedial regime courts must use in Title VII trials. The use of the simple past and future tenses, unqualified by other language, directs courts to apply the new procedures and remedies to prior conduct that was illegal before the Act and remains illegal now. Section 102 has prospective effect without regard to when the wrongful conduct occurred.

Sections 104 and 105 of the Act also address the adjudication of Title VII claims. Section 104 again defines a complaining party as "a person who may bring an action under [Title VII]," addressing the section to all future claimants without qualification. Section 105 is entitled "Burden of Proof in Disparate Impact Cases," and details at length shifting burdens of demonstration and available employer defenses—without reference to the timing of underlying events. Section 107 provides that a "complaining party" (a future claimant) establishes an "unlawful employment practice" when he or she "demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." This Section establishes simple but-for causation as the element to prove in future Title VII cases, without regard to when discriminatory conduct occurred. Since the conduct was and remains illegal, and since the Act merely updates the administration of old causes of action, the Act would have to qualify this simple language if it wished to exempt employers charged with discrimination after its effective date for conduct occurring before the effective date. In other words, the critical event for purposes of applying the Act's Sections on trial procedures is not the allegedly wrongful conduct, but the date of the trial itself.

Any change in procedure for new trials will produce different substantive results in at least some cases. This does not mean that all such changes, when unambiguously ordered by Congress, create a retroactivity issue. The Judicial Improvements Act of 1990, for example, enlarged federal jurisdiction by giving federal courts supplemental jurisdiction over claims "related" to a "case or controversy" where the court has original jurisdiction. 28 U.S.C. § 1367; Pub.L. No. 101-650 § 310(a), 104 Stat. 5089-5137. That Act fur-

ther provided that "section [310] shall apply to civil actions commenced on or after the date of the enactment of this act." § 310(c). Courts have not looked to when the underlying conduct in specific lawsuits took place to determine whether parties will be bound by the dislocating effects of litigating in federal rather than state court, or in one trial rather than two. In *American Pfauter v. Freeman Decorating Co.*, 772 F.Supp. 1071, 1073 (N.D.Ill. 1991), for example, the conduct underlying the suit occurred three months before Congress enacted the new supplemental jurisdiction statute. Although the dislocating effects of a statute creating a new category of jurisdiction are greater, the 1991 Civil Rights Act speaks in similar terms. Sections 3 and 105 create "guidelines for the adjudication of disparate impact suits," a statement no more ambiguous than the jurisdictional grant in the Improvements Act.

The language of Sections 102 through 107 would be enough to apply all their provisions prospectively to adjudication of future Title VII claims. But there is more—the Act expresses Congress' unambiguous intent to overrule certain Supreme Court cases that narrowly construed existing civil rights laws. Congress overrules court interpretations of its laws often.[7] For example, in 1976, *General Electric Co. v. Gilbert*, 429 U.S. 125, held that Title VII did not bar employers from discriminating against pregnant women in the workplace. Congress reacted with the Pregnancy Discrimination Act of 1978.[8] The PDA, as it was called, amended the definitions Section of Title VII to provide that "discrimination on the basis of sex" would include discrimination on the basis of pregnancy or related medical conditions. 42 U.S.C. § 2000e(k). After the PDA, *Gilbert* was no longer good law. The Supreme Court acknowledged this in *Newport News Shipping and Drydock Co. v. EEOC*:

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[7] See William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 335 (1991), for data and analysis of how often and why Congress overrules court decisions. Footnote four offers a list of Supreme Court cases overruled or modified by the Civil Rights Act of 1991.

[8] Pub.L.No. 95-555, 92 Stat. at 2076 (1978).

> [W]e shall consider whether Congress, by enacting the Pregnancy Discrimination Act, not only overturned the specific holding in *General Electric Co. v. Gilbert*, but also rejected the test of discrimination employed by the Court in that case. We believe it did.

462 U.S. 669, 676. Most pertinent to the 1991 Civil Rights Act, *Newport News* recognized that when Congress "overturned" *Gilbert* it rejected its reasoning in future cases. Congress has the power, then, to overrule a court's interpretation of a statute and demand that a decision will have no effect in future cases brought under the statute. *Newport News*, 462 U.S. at 676-682. The lack of any reference to *Gilbert* in the PDA shows that Congress need not name a decision to express such an intent; unambiguous disagreement is sufficient. 28 U.S.C. § 2000(e)(k).

The same situation exists with the Civil Rights Act of 1991. Consider *Patterson v. McClean Credit Union*, 491 U.S. 164, which interpreted 42 U.S.C. § 1981 to provide common-law damages only for discrimination in the formation of contracts, and not for firings, demotions, or failures to promote. Congress overruled *Patterson* in Section 101(b) of the Act:

> For purposes of [§ 1981], the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Courts' counter-majoritarian powers are justified in part because when Congress does not like a court's interpretation of a law, it is free to amend the law to clarify its will. It did so in the passage quoted above. Common sense and the Constitution require courts to assume that Congress means what it says. It would be sophistry to suggest that *Patterson* should have lingering effect in new civil rights cases for years to come, when Congress has so emphatically expressed its disapproval of that decision. By overruling *Patterson*, Congress erased it from the books, acting *prospectively* to reconfigure the adjudication of rights under pre-existing substantive laws.

For more evidence of Congress' intent, the Court need look no further than Section 105(a)(1)(C) on burdens of proof in disparate impact suits: "The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.' " On June 5, 1989, the Supreme Court decided *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, shifting burdens of proof in disparate impact cases to make discrimination harder to prove. *Wards Cove*, of course, had "retroactive" effect on the parties before it—parties whose conduct occurred under a previous regime, and who litigated relying on different burdens of proof than those required by *Wards Cove*. See *Luddington*, 966 F.2d at 228. Does this mean, then, that the law on June 4 before *Wards Cove* was "the same" as the law on June 5? *Id.* Of course not. What does Congress mean when it says it restores "the law as it existed on June 4?" It means simply that *Wards Cove* is to have no prospective effect in future disparate impact cases. If further evidence were necessary to show Congress' intent to abolish the burden scheme created by *Wards Cove* in future trials, the case is singled out and disapproved by name twice in the "findings" and "purposes" Sections that introduce the Act.

Suppose, in the extreme, that Congress penned the following law: "The Congress is dissatisfied with the framework courts have developed for adjudicating civil rights claims under 42 U.S.C. § 1981 and § 2000e. For these reasons, any person who may bring a claim under either of these laws will do so before the Civil Rights Claims Administration, constituted by the Act which follows." No court would read this hypothetical law to create two classes of claimants, one class (complaining of wrongful acts occurring *after* the Act's enactment) to bring claims to the newly constituted commission, the other relegated to the unsatisfactory framework developed by federal courts. Rather, all new claims would go to the new Civil Rights Claims Administration. Congress has spoken in similar terms at Section 3 of the Civil Rights Act of 1991: "The purposes of this Act are * * * to respond to recent decisions of the

Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Its intent to undo the old regime for adjudicating civil rights claims could not be clearer.

For these reasons, I would hold that after the effective dates of the Act, any decision overruled by Congress in the 1991 Civil Rights Act will have no effect on the adjudication of new civil rights claims. To express the point a different way, by overruling certain Supreme Court cases "prospectively" as to future lawsuits, Congress expressed its intent to bind parties "retroactively" to any dislocations in substantive outcomes that might occur under the new procedural and remedial regime. The Supreme Court's cases had their day, and Congress did not express its intent to overturn cases litigated and decided under the old regime—that would be retroactive action. But Congress has created a new regime. It has authored a statute directed primarily if not exclusively at the administration of our civil rights laws by federal judges, and we must heed Congress' obvious intent to apply the Act to new trials.

Our prior decisions in *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir. 1992), and *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992), are not at odds with my views. *Mozee* addressed "the difficult task of deciphering to what extent the Civil Rights Act [was] applicable to [a] case which was pending on appeal during its enactment." 963 F.2d at 931. Since "we [could] not divine from the Act's language whether Congress intended the Act to apply retroactively to pending cases," *id.* at 933, we examined the conflicting presumptions on whether an act of Congress applies retroactively. *Mozee* framed its analysis of Congressional intent around the question whether the Act required an appeals court to order a new trial under the new rules offered by the Act. The Act's silence, coupled with a judicial presumption against retroactivity, meant that the Act did not apply to cases pending on appeal. A contrary result would have required us to find that Congress intended to apply

the Act retroactively both to pre-Act *trials*, and to pre-Act *conduct*.[9] In the present case I would conclude that Congress intended to apply the Act prospectively to new trials. Since *Mozee* did not examine Congress' intent as to new cases, it does not give us the authority to overturn a verdict in Mojica's favor.

In *Luddington*, again reviewing the application of the Act to a case pending on appeal, we held that "the new act is applicable only to conduct engaged in after the effective dates * * * in the act, at least if suit had been brought before the effective date." 966 F.2d at 230-231. The reservation after the comma is critical, since Congress intended the act to apply to suits brought after the effective date. *Luddington* poses one potential problem for Mojica: her suit was brought both before and after the effective date of the Act, in the form of a pre-Act complaint and a post-Act amended complaint. However, since the Act is primarily about the trial procedures, burdens, and remedies to use in discrimination cases, *Luddington* does not bar Mojica's post-Act claim for compensatory and punitive damages and a jury trial. Since Mojica's case was tried after the Act was passed, the Act governs her trial on its own terms; Congressional intent requires no less. Congress' intent also promotes efficient and predictable judicial administration of civil rights claims: cases tried after the Act will use the new procedures and remedies; cases tried before the Act will not be retried because Congress did not express an intent to apply the new procedural regime retroactively to previously adjudicated cases.[10]

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[9] *Mozee* refused to apply the Act on remand because we thought the Title VII claims should be subject to the same laws on remand that applied in the first trial. *Id.* at 940.

[10] *Banas v. American Airlines*, 969 F.2d 477, 483 (7th Cir. 1992), and *Taylor v. Western and Southern Life Ins. Co.*, 966 F.2d 1188, 1199 (7th Cir. 1992), also involved the application of the 1991 Civil Rights Act to cases tried before the Act's enactment, so that today's decision does not affect our holdings in those cases.

Luddington also stated that "[w]hen [Congress] 'overrules' a Supreme Court decision it is not registering disagreement with what the Court did; it is laying down a new rule of conduct—ordinarily for the future." 966 F.2d at 228. Returning to the Act, however, we note that Sections 2 and 3 provide:

> The Congress finds that—
>
> * * *
>
> (2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), has weakened the scope and effectiveness of Federal civil rights protections.
>
> * * *
>
> The purposes of this Act are—
>
> * * *
>
> (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).
>
> * * *
>
> (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes * * *.

Contrary to our dicta in *Luddington*, this seems to "register[ ] disagreement with what the Court did." And where new trials are concerned, the Act does, in *Luddington*'s words, "lay[ ] down a new rule of conduct, * * * for the future" by establishing new burdens of proof, procedures, and remedies to use in *future* civil rights trials. It enacts few new rules of conduct where acts of discrimination are concerned, and none concerning Gannett's treatment of Mojica. Consequently, nothing in *Luddington* furnishes a reason to disapprove of the result I suggest today.

Congress registered similar disagreement with Court decisions in other recent statutes. The Older Workers Benefit Protection Act of 1990 provided that "The Con-

gress finds that, as a result of the decision of the Supreme Court in *Public Employees Retirement System of Ohio v. Betts*, 109 S.Ct. 256 (1989), legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 * * *." Pub.L.No. 101-433 § 101, 104 Stat. 978 (1990). The Civil Rights Restoration Act of 1987 provided that:

> The Congress finds that—
>
> (1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964; and
>
> (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

Pub.L.No. 100-259 § 2, 102 Stat. 28 (1988). *Lussier v. Dugger*, 904 F.2d 661 (11th Cir. 1990), relied in part on this language to infer that Congress intended the Restoration Act to reach certain types of pre-enactment conduct.[11]

Even if Congressional intent were ambiguous, application of the 1991 Civil Rights Act to Gannett would be fair, because few of the usual problems raised by retroactive application of new rules are present. *Mozee* expressly left open the possibility that the Act's procedural and remedial provisions might apply to pre-Act conduct. 963 F.2d at 939. We indicated that "[b]ecause society's valuation of a victim's losses understandably changes over time, it does not seem unfair to force litigating parties to com-

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[11] *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir. 1990), failed to take account of Congress' intent as expressed by Section 2 of the Restoration Act.

ply with the more recent statutory changes with regard to damages." *Id.* In *Luddington*, however, we noted that it might be unfair to subject employers to higher liabilities under the new Act because employers "are entitled to an opportunity to readjust their level of care in light of the new environment created by the change." 966 F.2d at 229. Several aspects of Mojica's case persuade me that it is not unfair to apply procedural and remedial provisions of the Act to Gannett's pre-Act conduct.

First, Mojica had the same set of "causes of action" before and after the 1991 Civil Rights Act. Her amended complaint allowed her to claim an alternative basis for quantifying the losses she suffered as a result of Gannett's alleged wrongful discrimination. By offering this alternative calculus, the Act eliminated the formalistic and largely useless distinction between a "common-law damages" formula for quantifying Mojica's losses—available post-Act—and an "equitable restitution" formula, available pre-Act. The losses were recognized as losses before and after the Act. In any given case, and indeed in Mojica's case, neither formula would necessarily yield a higher award. Gannett cannot claim that the alternate formula is somehow "unfair" absent such information, when it knew all along that discrimination was illegal. This argument also applies to the Act's offer of jury trials in Title VII cases.

In this respect, the present case is similar to *Littlefield v. McGuffy*, 954 F.2d 1337 (7th Cir. 1992). The jury in *Littlefield* found that McGuffy had intentionally discriminated against a woman because her boyfriend and daughter were black, in violation of the Fair Housing Act (FHA), 42 U.S.C. § 1362. Before trial, the FHA was amended to remove a punitive damages cap. McGuffy argued on appeal that the jury should have been instructed that at the time of his bad acts, the FHA contained the punitive damages cap. We rejected his appeal, in part because a parallel civil rights law (42 U.S.C. § 1982) exposed McGuffy to uncapped liability for the same acts:

> [T]he jury entered a general verdict for the plaintiff and awarded both compensatory and punitive damages without allocating specific amounts for violation of the Civil Rights Act, the Fair Housing Act, or Illinois common law. Under these circumstances, no material injustice was worked on the defendant * * *.

Id. at 1345. In today's case, the jury rendered a verdict against Gannett on national origin discrimination without distinguishing between the pre-Act Title VII and post-Act § 1981 grounds. Thus the verdict for Mojica would stand under *Littlefield* unless the new availability of a jury in Title VII cases would wreak a substantial injustice on Gannett. And Gannett cannot argue that it is unjust to defend civil suits before a jury instead of a judge without attacking the Seventh Amendment and challenging a major premise of case law following *Erie Railroad v. Tompkins*, 304 U.S. 64: that juries are "procedural" enough to apply federal jury requirements even where a federal court hears a state-law case in diversity. *Simler v. Connor*, 372 U.S. 221; *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500.

It can also be argued that the amount of money employers pay out on successful discrimination lawsuits is insignificant compared to the costs employers incur by answering complaints and generally trying to comply with the civil rights laws. Since the 1991 Civil Rights Act created no new norms against discrimination, Gannett would have had to answer Mojica's claim, defend it at trial, and perhaps pay her damages with or without the Act. Its risk of laying out substantial sums would have been present regardless of how the Act applied to Mojica's case. It would be hard for Gannett to show that the shift towards a perhaps higher award at the end of trial would have induced it to treat Mojica differently, when Gannett knew that discrimination was illegal and so many of the costs associated with that norm (such as compliance and answering complaints) were relatively fixed. In the long run, the Act may encourage more civil rights complaints by making discrimination easier to prove or by offering the prospect

of higher awards, thereby increasing the costs of employers like Gannett. But these are speculative, empirical questions that can only be answered over time. When Congress established new procedures and provided in the Act that those procedures should take effect upon enactment of the Act, it cast such questions aside.

In *Luddington*, we aptly characterized circuit court decisions that offered § 1981 damages for job discrimination occurring after contract formation as "a tentative regime, which *Patterson* swept away." 966 F.2d at 229. More pertinent today, however, is my conclusion that *Patterson*, *Wards Cove* and other cases overruled by the 1991 Civil Rights Act were also a tentative regime, swept away by Congress. Since Congress has expressed its intent, we are bound to respect it. I would affirm the judgment below.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—3-4-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IRENE MOJICA,	)	
	)	
Plaintiff,	)	
	)	Case No. 90 C 3827
V.	)	
	)	Visiting Judge
GANNETT COMPANY, INC.	)	Glen M. Williams
	)	
Defendant.	)	

MEMORANDUM OPINION

This case is before the Court on defendant's motion for Judgment Notwithstanding the Verdict ("J.N.O.V.") on the plaintiff's claim of national origin discrimination and the verdict awarding punitive damages. The plaintiff has responded to this motion and the Court will consider the jury's verdict for compensatory damages and the verdict for punitive damages separately.

National Origin Discrimination - Compensatory Damages

In ruling on a J.N.O.V., the Court must consider the evidence in the light most favorable to the plaintiff. Littlefield v. Mack, 752 F. Supp. 1417 (N.D. Ill. 1990) (all reasonable inferences granted to prevailing party). Conflicting testimony must be resolved in favor of the party opposing the motion. Madison County Jail Inmates v. Thompson, 773 F. 2d 834, 838 (7th Cir. 1985) (evidence reviewed in light most favorable to non-moving party). the court is of the opinion that the evidence was conflicting in this case.

The evidence, however, supports the jury's verdict that the defendant discriminated against the plaintiff because of her national origin. Irene Mojica ("Mojica") had ben employed at the radio station for approximately thirteen years. During those years, she made numerous complaints regarding her pay and the lack or opportunity to perform on the air during the non-overnight shifts. By 1986, the plaintiff progressed to the point that she was the best known A.M. disc jockey in her time slot. According to a survey, she had name identity ranked behind the "stars" of the drive-time shifts but ahead of other disc jockeys.

In 1986, the A.M. station went out of business. After moving to the F.M. station, the plaintiff's earnings never exceeded the level of income she was making in 1986. Furthermore, she was continually passed over when new openings became available for the non-overnight shifts. The undisputed evidence established that, subsequent to 1989 when she was assigned to the overnight shift, the plaintiff was the only disc jockey at the radio station who did not receive a raise.

The evidence also revealed that members of the black race, with the exception of CoCo Cortez, filled all the openings at the station for non-overnight shifts. CoCo Cortez is a Hispanic of Mexican descent; whereas, Mojica is a Hispanic of Puerto Rican descent. According to Cortez' testimony, she simply submitted a tape and was hired. Cortez said she knew no one at the station. There is no evidence that, at the time she was hired, the radio station was aware of Coco Cortez' race. The station manager testified he hired her on Smith's recommendation after listening to a tape. Smith did not testify in the case.

There is strong evidence in the case, however, that the station discriminated against CoCo Cortez. According to her testimony, the expenses promised by the radio for her move

from Dallas to Chicago were never paid; although hired for fulltime work she began work as a part-time employee; and, after obtaining a full-time slot, she was never paid what she was promised. Therefore, she quit as soon as she obtained another job. Cortez was replaced by Mike Hudson ("Hudson"), a black male. Hudson was young and inexperienced and was placed in a better time slot than Mojica. He subsequently received numerous pay raises. Mojica, however, was relegated to the overnight shift and never received a pay raise after 1989. All of those receiving pay raises were black.

Mojica testified that when she protested to the station manager about her pay and her shift. The station manager assigned the reason that she was Hispanic working for a black-oriented radio station. While the manager denied this evidence, this issue was a question of credibility to be resolved by the jury.

The verdict of the jury awarding $35,000 compensatory damages is clearly supported by the evidence. Obviously, the jury concluded that there was no discrimination by denying plaintiff the drive-time shifts where the employees were independent contractors whose salary was paid by a corporation. The jury quite properly considered the pay raises granted to Ross, Dell, Michaels, and Hudson while Mojica received no raise at all. Obviously, the jury also considered that Mojica was never given due consideration for these better time slots. The evidence showed that while Mojica was paid $30,000 per year, other non-prime time slots were paid as much as $48,000 - a pay differential over two years of $36.000. Therefore, the jury's award of $35,000 compensatory damages is reasonable.

Punitive Damages

While this Court considers itself legally bound by Judge Hart's decision in this case to permit the last minute amendment to the complaint seeking punitive damages as a result of the 1991 amendment to Title VII, I respectfully disagree with my brother judge. I do not consider that it serves the ends of justice to impose punitive damages on actions taken during 1986-87, 88, 89, and 90-91 when the law did not permit punitive damages. Furthermore, I would not have permitted an amendment on the eve of trial, such amendments, however, are considered in the discretion of the trial court. Nevertheless, I hereby sustain defendant's motion of J.N.O.V. bases on the evidence in this case and not on my personal legal philosophy.

To justify an award of punitive damages, the evidence of the defendant's conduct would have to show "malice," "evil motive," "reckless" behavior, or "callous indifferences." Yarbrough v. tower Oldsmobile, Inc., 789 F. 2d 508, 514 (7th Cir. 1986). No such evidence exists in this case. Indeed, if punitive damages were allowed in this case, then every act of discrimination would require punitive damages as a matter of law. Undisputed evidence in this case negates rather than indicates malice, recklessness, or callous indifference.

The station manager of WGCI-FM at the present time, Dyson, is the same individual who hired Mojica in late 1978 or early 1979. The evidence is further undisputed that they remain friends to the date of this trial; and indeed, Mojica attended Dyson's wedding and is a friend of his wife. Mojica, during her years with the A.M. station manager by Dyson, received promotions, pay raises, and favorable shift assignments until it went off the air. In 1986 or 1987 when the A.M. station closed, Dyson intervened to aid Mojica by providing a part-time job on the F.M. station. Further, in late 1989 when Smith was about to hire CoCo Cortez, Mr. Dyson again interceded to give Mojica the job. While the Court

believes that there is evidence that beginning in 1989 Mojica failed to receive pay increases and favorable shift assignments given to black employees, there is no evidence that this was done with malice, either expressed or implied, or with callous indifference of callous disregard or other evil motive. Accordingly, defendant's motion for J.N.O.V. on the punitive damages claim is GRANTED.

Equitable Relief and Attorney's Fees

The Court will award attorney's fees to plaintiff in this case and will permit filing of the fee petition within fourteen days following entry of the final order in this case. The Court also grants injunctive relief against future discrimination in job assignments and against retaliation.

The Court is of the opinion that an order moving Mojica to another shift is not a practical recourse since it might cause potential harm to other employees and potential harm to the finances of the radio station itself. However, the Court is not impressed with policy of the station to base pay entirely on the shift assignment. It is not unusual in any business that the more lucrative parts of the business help subsidize the smaller income producing units. For example, in a drug store, the bigger profits probably come from the sale of drugs, while the soda fountain part of the drug store may only break even. Yet the soda fountain tends to entice some people to also buy their drugs there. I think the disc jockey business is somewhat the same. Should a person who works at the soda fountain be denied raises and chances of promotion perhaps to the hardware side of the drug store? Also, it is arguable that an undesirable shift should be paid more because of the more dangerous working conditions. I will, therefore, order a $5,000 raise beginning July 1,1992 assuming she continues on the "hoot owl" or "graveyard" shift and another $5,000 raise effective January 1, 1993. The

Court will retain jurisdiction during this time for other relief if appropriate.

ENTER: This 13th day of December, 1991.

Glen M. Williams
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IRENE MOJICA,	)	
	)	
Plaintiff,	)	
	)	Case No. 90 C 3827
V.	)	
	)	Visiting Judge
GANNETT COMPANY, INC.	)	Glen M. Williams
	)	
Defendant.	)	

ORDER

In accordance with the memorandum opinion of the court and the verdict of the jury; and upon consideration of the motions of Defendant for judgment notwithstanding the verdict ("J.N.O.V."), the Court overrules the motion of the Defendant with regard to its findings of national origin discrimination, and judgment is granted to the Plaintiff in the sum of $35,000 with interest from the 13th day of December, 1991 at the rate of 4.98%, and costs for which execution shall issue.

Defendant's motion for J.N.O.V. on the issue of punitive damages is granted and final judgment on the issue of punitive damages is granted to defendant.

Plaintiff shall submit her petition for attorney's fees within fourteen days following entry of final order and Defendant shall have fourteen days to respond after the petition is filed.

By way of additional relief, the court orders the following:

Effective January 1, 1992, Defendant shall increase Plaintiff's annual salary from $30.000 to $35.000.

Effective July 1, 1992, Defendant shall increase Plaintiff's annual salary from $35.000 to $40,000.

Effective January 1, 1993, Defendant shall increase Plaintiff's annual salary from $40,000 to $45,000.

The salary increases provided for herein are contingent upon Plaintiff remaining in the position of overnight announcer through the scheduled dates of the salary increases.

Defendant is also enjoined permanently from discriminating against the Plaintiff in the terms and conditions of her employment on the basis of Plaintiff's national origin.

ENTER: this 13th day of December, 1991.

Glen M. Williams
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IRENE MOJICA,	)	
	)	
Plaintiff,	)	
	)	No. 90 C 3827
V.	)	
	)	
GANNETT COMPANY, INC.	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Irene Mojica filed this action against defendant Gannett company, Inc. in July, 1990. Plaintiff is employed as the overnight (1:00 a.m. to 5:00 a.m.) disc jockey for WGCI-FM, a Chicago radio station owned by defendant. She alleges discrimination because she is female and Hispanic. Her claims are that she receives a lower salary and less favorable assignments than male and non-Hispanic disc jockeys and that she has been sexually harassed by certain station employees. Her complaint contains six counts: (1) sex discrimination in violation of the Equal Pay Act, 29 U.S.C. Section 206 et seq.; (2) sex discrimination in violation of Title VII of Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq.; (3) national origin discrimination in violation of Title VII; (4) national origin discrimination in violation of the Civil Rights Act of 1866, 42 U.S.C. Section 1981; (5) retaliation in violation of Section 1981; and (6) retaliation in violation of Title VII. Plaintiff seeks damages for the period 1988 through 1991 and injunctive relief. This case is presently set for trial before a visiting judge on December 2, 1991.

Anticipating that the Civil Rights Act of 1991 (the "1991 Act") would soon be passed, on November 12, 1991 plaintiff filed a motion to amend her complaint. That motion was presented in court on November 25, by which time the 1991 Act had been signed into law, the president having signed it on November 21. Plaintiff seeks to amend her complaint to add compensatory damages, punitive damages, and a jury demand for her Title VII claims. She also moves to strike any motion of defendant seeking to limit her Section 1981 claims or to keep evidence of sexual harassment from the jury. The parties are in agreement as to how application of the 1991 Act would affect this case. The parties, however, disagree as to whether the 1991 Act applies to all cases pending at the time the Act was passed and to all future cases. Defendant contends it only applies to conduct occurring on or after the date on which the 1991 Act was passed.

Section 3 of the 1991 Act states:

> The purposes of this Act are--
>
> (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
>
> (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971) and in other Supreme Court decisions prior to Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989);
>
> (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suite under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and
>
> (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protections to victims of discrimination.

Section 22 of the 1991 Act sets forth the effective date of the Act:

> (a) IN GENERAL.--Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.
>
> (b) CERTAIN DISPARATE IMPACT CASES.--Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975 and for which an initial decision was rendered after October 30, 1983.

Senator Danforth, one of the cosponsors of the legislation, at one time stated on the floor of the Senate that the new legislation was to apply prospectively only. Senator Kennedy expressed a disagreement with that view. Ultimately, however, Senator Danforth expressed the view that there was no clear legislative history, only various and inconsistent statements from a number of senators and representatives and that any court seeking to interpret the statute should look to the language of the statute, not the statements of the legislators, and apply appropriate rules of construction. See 137 Cong. Rec. S15,483 (daily ed. Oct. 30, 1991); Id. S15,325 (daily ed. Oct. 29, 1991). The parties agree that the legislative debates are inconclusive and that the court should construe the language of the statute based on case precedent.

A recent Supreme Court case acknowledges that there are inconsistent precedents regarding what to do when language and legislative history are inconclusive on the question of whether a statute is to be applied retroactively. See Kaiser Aluminum & Chemical Corp. v. Bonjorno, 110 S. Ct. 1570, 1576-77 (1990). One line of cases indicates that retroactivity is disfavored and that congressional enactments and administrative rules will not be construed to have a retroactive effect unless their language requires otherwise.

See Bowen v. Georgetown University Hospital, 109 S. Ct. 468, 471 (1988) (agency did not have congressional authority to promulgate retroactive cost rules). Another line of cases indicates that statutes going into effect during the pendency of a case are presumed to be applied in that case unless there is clear congressional intent to the contrary or application of the law would result in manifest injustice to one of the parties. See Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974) (intervening statute applies unless a contrary intention appears or the application would result in manifest injustice); Thorpe v. Durham Housing Authority, 393 U.S. 268 (1969). In Bonjorno, it was unnecessary to resolve any inconsistency in the cases because a clear congressional intent (against retroactivity by making the statute effective six months after enactment) was found. [1] A recent Seventh Circuit case, however, holds that Bradley continues to apply. After noting that Bonjorno recognizes an existing tension, but does not resolve it, Judge Ripple stated:

> Despite the existence of an alternative line of precedent, we believe there is no prejudice in applying only Bradley and its progeny to the facts in this case. Any tension between the two lines of precedent is negated because, under Bradley, a statute will not be deemed to apply retroactively if it would threaten manifest injustice by disrupting vested rights.

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[1] In a concurring opinion, Justice Scalia states that he would hold that the rule announced in Thorpe and Bradley is wrong and that absent specific indication to the contrary, the operation of nonpenal legislation is prospective. Bonjorno, 110 S. Ct. at 1579 ff. (Scalia, J. concurring).

Federal Deposit Insurance Corp. v. Wright, 942 F. 2d 1089, 1095 n. 6 (7th Cir. 1991). Contra Simmons v. Lockhart, 931 F. 2d 1226, 1230 (8th Cir. 1991) (holding that Georgetown is the better rule). This court will follow the Seventh Circuit and apply Bradley. [2]

It is presumed that the 1991 act applies to the present case unless there is a clearly expressed congressional intent to the contrary or that it would be a manifest injustice to so apply the new Act. In discerning congressional intent, analysis must begin with the pertinent language of the statute, viewed in the context of the language and design of the statute as a whole. Orrego, 943 F. 2d at 734 (quoting K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)). The statute expressly states that it was designed to overturn certain recent Supreme Court decisions that were said to have weakened the scope and effectiveness of federal civil rights protections. See 1991 Act Sections 2(2), 3(2), 3(4). That Congress overturned Supreme Court interpretations of an existing statute provides some support for applying the new amendments retroactively. See

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[2] Two weeks after Wright, the Seventh Circuit, Judge Ripple again speaking for the court, decided Orrego b. 833 West Buena Joint Venture, 943 F. 2d 730, 734-35 (7th Cir. 1991), in which it cited Georgetown for the proposition that an agency had no authority to promulgate retroactive rules. Judge Ripple also cited Bradley for the manifest injustice rule. See Id. at 736. Orrego is factually distinguishable. There the statute was stated to apply to existing loans and the loan that was the subject of Orrego had been paid off before the new legislation was enacted. Wright is the controlling Seventh Circuit precedent regarding the continuing viability of Bradley.

Mrs. W. v. Tirozzi, 832 F. 2d 748, 755 (2d Cir. 1987); Leake v. Long Island Jewish Medical Center, 695 F. supp. 1414, 1417 (E.D.N.Y. 1988), aff'd, 869 F. 2d 732, 754-55, vacated & reh'd en banc, 914 F. 2d 676 (5th Cir. 1990) (en banc), cert. granted, 111 S. Ct. 1579 (1991). [3] Such a circumstance, however, is not, by itself, conclusive evidence of a congressional intent to apply the statute retroactively. See DeVargas v. Mason & Hanger-Silas Mason Co., 911 F. 2d 1377, 1385 (10th Cir. 1990), cert. denied, 111 S. Ct. 799 (1991); Leake, 695 F. 2d at 1417. Consistent with Bradley, in order to avoid application of the statute, there must be at least "a fair indication that the statute, properly construed, has only prospective effect." Wright, 942 F. 2d at 1095 (quoting Campbell v. United States, 809 F. 2d 563, 572 (9th Cir. 1987)). That Congress was overturning Supreme Court interpretations of the Civil Rights Act of 1964 is evidence against concluding there is a fair indication Congress intended the 1991 Act to apply prospectively only.

The specific provision regarding the effective date of the statute simply states that it is effective upon enactment. 1991 Act Section 22(a). Section 22(b), which applies only to disparate impact claims and therefore is not directly applicable to this case, states that nothing in the Act applies to disparate impact cases filed before March 1, 1975 and for which an initial decision was rendered prior to October 30, 1983. Implicit in such a provision is the possibility that the Act is otherwise applicable to cases filed after March 1, 1975 and

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[3] On the merits of the case, the en banc court reached a different result than the panel. It was thus unnecessary for the en banc court to consider whether the statute involved in that case, the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28, 42 U.S.C. Section 2000d-4a, applied to cases pending at the time the Restoration Act was passed.

before enactment of the statute in 1991. Again, this provision supports retroactive enforcement of the statute, but is not conclusive. Still, it goes against concluding that the statute fairly indicates that it is to be applied prospectively only.

As previously indicated, the legislative debates are inconclusive regarding the retroactivity of the statute. Since the language and legislative history of the statute do not fairly indicate that the statute is to be applied prospectively only the presumption of retroactivity remains. Still to be determined is the question of whether it would be a manifest injustice to apply the statute retroactively.

In determining whether retroactive application would be a manifest injustice, three factors are to be considered: "1) the nature and identity of the parties; 2) the nature of the rights affected; and 3) the impact of the change in the law on pre-existing rights." Wright, 942 F. 2d at 1096 (quoting In re Busick, 831 F. 2d 745, 748 (7th Cir. 1987)). The first factor concerns whether the matter is one between private parties only or one that involves a public entity or public concern. If only involving private concerns, then a court should be more reticent in applying a new statute retroactively if there is an undue impact on the parties' previously existing rights or relationship. That the circumstances involve private parties only, though, does not preclude retroactive enforcement. See, e.g., Busick, 831 F. 2d at 748-49. Here, the case is between private parties only. However, the 1991 Act, like the Civil Rights Act of 1964, is intended to promote equality in our nation and provide a remedy for discrimination. This is a public concern of great importance in our society. While the present case is not one where the plaintiff is acting in the role of a "private attorney general," See Bradley, 416 U.S. at 719, the public component of the dispute between the parties cannot be ignored. The 1991 Act itself generated great public interest and substantial political dispute. While the private nature of this particular litigation is recognized, it is also

recognized that this case and the legislation under consideration involve matters of substantial public concern.

The second factor to consider is the nature of the rights involved. The question here is whether application of the new law "would infringe upon or deprive a person of a right that had matured or become unconditional." Bradley, 416 U.S. at 720. The parties do not have substantial right to a bench trial, whereas the right to a jury trial, even if statutorily granted, is entitled to substantial protection. See Fed. R. Civ. P. 38 (a). The second factor does not go against applying the provisions for a jury trial retroactively.[4] Scarboro v. First American National Bank of Nashville, 619 F. 2d 621, 622 (6th cir.) (per curiam), cert denied, 449 U.S. 1014 (1980) (amendment to Age Discrimination in Employment Act providing for jury trial applies retroactively).

That the holding of Patterson v. McLean Credit Union, 491 U.S. 164 (1989), has been effectively superseded as to its limitation of Section 1981 actions also does not affect a mature right of defendant. The discriminatory conduct alleged by plaintiff began prior to the holding in Patterson. Therefore, at the time the conduct began, the prevailing law was consistent with the 1991 Act's amendment to Section 1981. Also, from the beginning of defendant's alleged conduct until the passage of the 1191 Act, the conduct alleged was always prohibited by Title VII even if not by Section

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[4] On the question of keeping evidence of sexual harassment from being heard by the jury, even if the law had not changed to make the sexual harassment claim a jury issue, the evidence probably would not have been kept from the jury. Although the parties have not fully presented the issue, it is likely that evidence of sexual harassment occurring at the workplace would be relevant to proving intentional gender discrimination and therefore would have been relevant even if there were not a separate sexual harassment claim.

1981 to the extent Patterson was in force. Therefore, the change in the law did not affect the rights and obligations of the parties. See Bradley, 416 U.S. at 721; Hicks v. Resolution Trust Corp., 738 F. Supp. 279, 286 (N. D. Ill. 1990). What changed is plaintiff's ability to obtain additional damages for her injuries, though her Equal Pay Act claim already permitted her to obtain liquidated damages. The increased potential for damages, however, is not likely to have affected the conduct of the parties in committing any acts of discrimination that may have occurred. See Hicks, 738 F. Supp. at 286. While it is possible that prior knowledge of the full potential for liability might have affected the parties' settlement posture, no such argument is presented by defendant so it need not be considered whether such an effect could be a manifest injustice.

The third factor is the impact of the change in the law upon existing rights. Stated another way, this factor concerns "the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." Bradley, 416 U.S. at 720. As previously discussed, the law was already clear that the alleged conduct of defendant was prohibited. Given this fact and that there was no apparent effect on conduct, this factor does not militate against applying the statute retroactively. Cf. id. at 721; Hicks, 738 F. Supp. at 286.

For the foregoing reasons, it is determined that retroactive application of the 1991 Act would not be a manifest injustice.

IT IS THEREFORE ORDERED that:

(1) Plaintiff's motion to amend her complaint is granted. An amended complaint shall be filed by December 2, 1991. That amended complaint may demand a jury trial and pray for compensatory and punitive damages consistent with the provisions of the Civil Rights Act of 1991.

(2) The Civil Rights Act of 1991 is applicable to plaintiff's claims. At the commencement of trial on December 2, 1991, each party shall present the trial judge with an original and one copy of her or its amended proposed jury instructions consistent with this holding.

ENTER:

William T. Hart
United States District Judge

Dated: November 27, 1991